85-1358 (1)

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

WILLIAM L. LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES

Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. Whether, under the Social Security Act, a State can require a recipient of an Aid to Families with Dependent Children (AFDC) grant who receives a lump sum personal injury award to use such funds to meet future living expenses in lieu of allowing such recipient to spend the funds to regain AFDC eligibility?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

NO. _____

WILLIAM L. LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

William L. Lukhard, Commissioner of the Virginia Department of Social Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this matter.[1]

I.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 774 F.2d 1270 (4th Cir. 1985) and is included in Appendix A at App. 1.

The Order of the court of appeals denying petitioner's motion for rehearing with a suggestion for rehearing en banc is set forth in Appendix C at App. 55.

The Order of the court of appeals staying its mandate is set forth in Appendix C at App. 58.

The Order of the court of appeals denying respondents' motion to vacate or modify the stay of mandate is set forth in Appendix C at App. 61.

The Opinion and Order of the United States District Court for the Western District of Virginia, Roanoke Division, is reported at 591 F. Supp. 1247 (W.D. Va. 1984), and is included in Appendix B at App. 23.

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[1]The parties in the proceedings below included plaintiffs Ona Mae Reed, Sallie Long, Ruth Wilcher, Opal Mae Cook, Stella King, and all others similarly situated; William L. Lukhard, Commissioner, Virginia Department of Social Services; and the Secretary of the United States Department of Health and Human Services.

The Final Order of the district court, issued on October 3, 1984, is set forth in Appendix B at App. 53.

II.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1985. Petitioners filed a petition for rehearing with a suggestion for an en banc rehearing on October 31, 1985, which the court of appeals denied on November 14, 1985. The court of appeals stayed the mandate on November 21, 1985, upon motion of the petitioner, pending application to this Court for a writ of certiorari. The jurisdiction of this Court to issue a writ of certiorari in this case is based on 28 U.S.C. § 1254(1).

III.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The provisions of law involved in this case are too lengthy to be set out verbatim here. They are, however, set out verbatim in Appendix D. Those provisions of law are:

1. 42 U.S.C. § 602(a)(17) (App. 63)
2. 42 U.S.C. § 602(a)(17) (amended 1984) (App. 64)
3. 45 C.F.R. § 233.10(a)(1) (App. 66)

4. 45 C.F.R. § 233.20(a)(3)(ii)(D) (App. 68) (current version at 45 C.F.R. § 233.20(a)(3)(ii)(F) (App. 69)

5. Virginia Department of Social Services Aid to Dependent Children Manual, § 305.4(C) (App. 71)

6. Virginia Department of Social Services Aid to Dependent Children Manual § 305.4(C) (amended 1985) (App. 78)

IV.

STATEMENT OF THE CASE

The central issue presented in this petition concerns the treatment of the receipt of a nonrecurring lump sum of money by a recipient of an Aid to Families with Dependent Children (AFDC) grant.[2]

Congress amended the statutory provision primarily at issue in this case, 42 U.S.C. § 602(a)(17),[3] in 1981 as a part of

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[2]The AFDC program is codified at 42 U.S.C. §§ 601-615.

[3]Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub.L. No. 97-35, § 2304, 95 Stat. 357, 845.

an extensive attempt to cut the federal budget. This amendment created what is known as the "lump sum rule," which provides for a period of prospective ineligibility for AFDC benefits where a member of the AFDC family has received a lump sum payment. In essence, the lump sum becomes the family's AFDC grant for a prescribed period. The period of ineligibility is determined by dividing the total of a family's lump sum and other income by the family's monthly standard of need. The resulting quotient represents the number of months of disqualification.[4]

The 1981 amendment required that the "lump sum rule" be incorporated by states into their AFDC plans. In response to this requirement, Virginia adopted § 305.4(C) of the Department of Social Services' Aid to Dependent Children Manual ("the Manual") (App. 71). This regulation requires the

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[4]Prior to OBRA, a lump sum payment was regarded as income only in the month received; thereafter, to the extent that any was left, it was considered a resource. As income in the month of receipt, it would disqualify the AFDC recipient from eligibility for that month; treated as a resource in the following months, the lump sum would impact eligibility if retained, but if expended, the family would be eligible for AFDC benefits in the month next after the resource has been spent down to permissible legal levels.

proration of a nonrecurring lump sum received from any unearned source, including personal injury awards. Before the period of ineligibility is calculated, however, the lump sum is first reduced by associated expenses, such as medical expenses and legal fees, which were incurred prior to or within thirty days after receipt of the award. Additionally, this Manual section permits a shortening of the period of ineligibility where a life-threatening circumstance exists and the lump sum has been or will be expended for such circumstances, in accordance with the provisions of 45 C.F.R. § 233.20(a)(3)(ii)(D).[5] Virginia's application of the "lump sum rule" has been approved as being in compliance with the federal statute and implementing regulations by the U.S. Department of Health and Human Services.[6]

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[5]Approximately 231 AFDC cases in Virginia have been terminated annually in Virginia because of lump sum insurance payments. See Reed v. Lukhard, 591 F. Supp. 1247, 1251 (W.D. Va. 1984). Respondents themselves, in their Brief in Support of Motion to Restore Injunction Pending Appeal, have estimated a yearly cost to Virginia and the federal government of between $1.8 million to $3.6 million to provide AFDC benefits to the class.

[6]The U.S. Department of Health and Human Services has concluded that Congress intended all lump sum payments to be income subject to the "lump sum rule." See 49 Fed.

Respondents Reed, Long, & Wilcher, in a class action initiated on June 6, 1983, challenged Virginia's policy of counting a personal injury settlement or award as income subject to the lump sum rule rather than as a resource, alleging that such policy violated 42 U.S.C. §§ 602(a)(7), (a)(10), and (a)(17).[7] Subsequent to the initiation of this suit, Respondents Cook and King were allowed to intervene as plaintiffs, and the U. S. Department of Health and Human Services was joined as a necessary party.

Upon cross-motions for summary judgment, the district court held that personal injury awards were not income for the purposes of applying the "lump sum rule." The district court, relying upon the dictionary definition of income and the meaning of income in the context of the Internal Revenue Code, concluded that the meaning of income does not encompass compensation for personal injuries. 591 F. Supp. at

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Reg. 45558, 45561 (Nov. 16, 1984) (Notice of Proposed Rulemaking).

[7]The respondents' Complaint also challenged the application of the "lump sum rule" to AFDC recipients who were without earned income. The district court granted petitioner's Motion for Summary Judgment on that issue, and no appeal was taken. 591 F. Supp. at 1256-1257 [Appendix B at App. 37-41].

1253-1254 [Appendix B at App. 47-51]. The district court further concluded that Congress intended to limit the application of the "lump sum rule" to only those lump sum payments that met the ordinary meaning of income. Id.

Petitioner appealed the decision on the ground that personal injury recoveries were properly treated as income for purposes of applying the "lump sum rule." The court of appeals affirmed the decision of the district court. With regard to the question of whether personal injury recoveries were income for purposes of applying the "lump sum rule," the court of appeals found that, in adopting 42 U.S.C. § 602(a)(17), Congress intended to reach only payments that would ordinarily be considered income and not all large payments of money. 774 F.2d at 1273-1275 [Appendix A at App. 14-17]. The court of appeals further held that Virginia's regulation applying the "lump sum rule" to personal injury awards was arbitrary and inequitable and thus violated 45 C.F.R. § 233.10(a)(1), known as the "equitable treatment regulation." Id.

V.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The United States District Court for the Western District of Virginia, Roanoke Division, assumed jurisdiction of this matter under 28 U.S.C. §§ 1331 and 1343. 591 F. Supp. at 1248 (App. 24).

VI.

REASONS FOR GRANTING THE WRIT

A.

THIS CASE RAISES A SUBSTANTIAL FEDERAL QUESTION WHICH THIS COURT SHOULD AGREE TO DECIDE NOW IN ORDER TO ASSURE CONSISTENCY IN THE ADMINISTRATION OF THE AFDC PROGRAM

Since the enactment of 42 U.S.C. § 602(a)(17) in 1981, numerous states have been engaged in litigation in both federal and state courts regarding the question of whether personal injury awards may be considered as income subject to the lump sum rule set forth in 42 U.S.C. § 602(a)(17).[8]

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[8] Barnes v. Cohen, 749 F.2d 1009 (3rd Cir. 1984), cert. denied __ U.S. __, 105 S.Ct. 2126 (1985) (federal question not answered, decided on state law grounds); Davis v. Coler, 601 F. Supp. 444 (N.D. Ill. 1984), appeal docketed No. 85-2481 (7th Cir. 8/29/85) ("lump sum rule" applies to payments to compensate personal injuries); Jackson v. Guissinger, 589 F.

That litigation continues unabated and has resulted in conflicting interpretations of congressional intent and purpose on a question that is important both to Congress and to the states. At issue is not only the increasingly critical problem of allocation of scarce federal and state welfare dollars, but also the important social question of whether public assistance recipients who have funds available with which to support themselves should be expected to use those funds to meet the basic needs of life or encouraged to spend the money as quickly as possible to regain AFDC eligibility. Unless this Court undertakes to review the question presented

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Supp. 1288 (W.D. La. 1984) (net proceeds of personal injury claims were properly treated as income); LaMadrid v. Hegstrom, 599 F. Supp. 1450 (D.C. Ore. 1984), appeals docketed Nos. 85-3704 and 85-3719 (9th Cir. 3/14/85) (personal injury awards not income subject to "lump sum rule"); Streahl v. Hegstrom, CV-85-1283-RE (D.C. Ore. 1985), appeals docketed Nos. 85-4426 and 85-4420 (9th Cir. 12/5/85) (life insurance settlement not subject to "lump sum rule"); Littlefield v. State Dept. of Human Services, 480 A.2d 731 (Me. 1984) (net monies received in settlement of personal injury claims constituted income); Watkins v. Blinzinger, 610 F. Supp. 1443 (S.D. Ind. 1985) appeal docketed No. 85-2366 (7th Cir. Aug. 8, 1985) (personal injury awards are income and are to be budgeted); White v. Rahm, Civ. No. C85-0071 (W.D. Wa. Feb. 8, 1985), appeal docketed No. 85-3975 (9th Cir. 7/5/85) (personal injury awards not income subject to the "lump sum rule"); Finch v. Kirk, et al., 86-90-CN-5 (E.D. N.C., filed Jan. 21, 1986).

in this petition, AFDC recipients in Maine, Louisiana, Illinois, and Indiana will be treated differently than AFDC recipients who happen to reside in Washington, Oregon, Virginia, and other states in the Fourth Circuit. The decision of the court of appeals will thus cause disparity in the administration of the AFDC program where Congress clearly intended uniformity.

The preponderance of the decisions rendered to date on the application of the "lump sum rule" run counter to the result reached by the court of appeals in this case. Moreover, the court of appeals' ruling is in clear conflict with the holding of the Supreme Judicial Court of Maine in Littlefield v. State Department of Human Services, 480 A.2d 731 (Me. 1984), and is inconsistent with the opinions of the Sixth Circuit Court of Appeals in Walker v. Adams, 741 F.2d 116 (6th Cir. 1984), and the First Circuit in Sweeney v. Murray, 732 F.2d 1022 (1st Cir. 1984).

In Littlefield, the Supreme Court of Maine examined the legislative history surrounding the 1981 OBRA amendments and held that monies received by a recipient of AFDC benefits in settlement of a personal injury claim constituted

income within the meaning of the "lump sum rule." In Sweeney, the First Circuit Court of Appeals, in order to determine whether the "lump sum rule" applied to AFDC families without earned income, made an exhaustive analysis of the Social Security Act, the OBRA amendments, and the regulations thereunder. In describing the "lump sum rule," the court stated:

> The amended rule provides that when an AFDC family receives a payment of nonrecurring lump-sum income (such as an inheritance, a personal injury judgment or settlement, or a worker's compensation award) the family becomes ineligible for AFDC for a prescribed period of time.

Sweeney v. Murray, 732 F.2d at 1024.

In Walker, the Sixth Circuit Court of Appeals addressed a case involving an AFDC recipient who had received an insurance settlement from an automobile accident. While, again, the specific question before the Court was whether the "lump sum rule" applied to AFDC recipients who had no earned income, the Court had no difficulty applying the rule against a personal injury settlement and, like the First Circuit in Sweeney, described lump sum payments as "an

inheritance, insurance settlement, or disability benefits." Walker v. Adams, 741 F.2d at 117.

The court of appeals in this case, however, examined the same legislative history relied upon by these other courts and reached the contrary conclusion that Congress intended the lump sum rule not to be applicable to proceeds from personal injury awards. The court of appeals relies almost exclusively on two sentences of the Senate Finance Committee Report for its conclusion. That Report stated:

> Under present law, any payments that meet the definition of income (e.g., retroactive social security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered a resource in the months thereafter.
>
> The committee amendment would require that large payments, together with other income remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program.

S. Rep. No. 139, 97th Cong., 1st Session, 505, reprinted in 1981 U.S. Code Cong. & Ad. News at 702.

It is unclear why the court of appeals held that such language unmistakably reveals a congressional intention to restrict the application of the "lump sum rule" to those payments that would ordinarily be considered income. The first

sentence in the Finance Committee Report merely restates the then current law. The second sentence, which is the key sentence describing the proposed change, refers merely to "large payments." It contains no qualifications or exclusions.

Moreover, the court of appeals' reading of the intent of the statute is inconsistent with what the Administration had proposed to Congress despite the fact that nothing in the legislative history indicates that Congress rejected or altered the Administration's proposal in any way. Secretary Schweiker, in submitting the bill to Congress, testified:

> Under current law, there is no way to assure that large payments, such as lump-sum payments of insurance proceeds, or retroactive benefit payments, are considered available to meet current needs over a period of time, even though the family eligibility can be curtailed for the month of receipt. The proposal would specify that these large payments, together with other income remaining after application of the disregards, would be considered as income in the month of receipt and that the family would be ineligible for the number of months obtained by dividing all that month's countable income by the applicable standard. (Emphasis added.)

Section by Section Summary, Social Welfare Amendments of 1981, submitted to the Speaker of the House of Representatives on May 5, 1981 (App. 90).

Comparison of the two sentences in the Senate Finance Committee Report, excerpted and relied upon by the court of appeals, to the two sentences of Secretary Schweiker's statement in his section-by-section summary reveals that they are remarkably similar in both content and structure. In each statement the first sentence is a statement of the then "current" law.

The second sentence in both the Secretary's statement and the Committee's Report is a statement of what was intended to be changed. Secretary Schweiker refers to "these large payments, together with other income remaining after the application of the disregards," alluding to his examples in the first sentence of lump-sum payments of insurance proceeds or retroactive benefit payments. The Senate Finance Committee Report does not make reference to its sole example in the first sentence but merely states "large payments, together with other income remaining after the application of disregards." In rendering its decision on this issue, the court of appeals must necessarily have concluded that Congress rejected or limited the Administration's proposal. Nonetheless, a comparison of the above language

from the Senate Finance Committee and the formal statements of Secretary Schweiker reveals just the opposite. It is clear they intended the same thing.

Furthermore, the court of appeals' reading of congressional intent fails to consider this issue in the broader context of the uncontroverted Congressional purposes in enacting the OBRA amendments in general and the "lump sum rule" in particular. These purposes have been clearly articulated by the various courts that have reviewed these amendments previously:

- to reduce or eliminate welfare benefits for those considered by Congress to be less needy than those completely without resources - persons or households that have available other sources of income or resources with which to support themselves. James v. O'Bannon, 715 F.2d 794, 808 (3rd Cir. 1983); see also Bell v. Massinga, 721 F.2d 131 (4th Cir. 1983).

- to correct the perverse effect of encouraging the family to spend such income as quickly as possible in order to retain AFDC eligibility, and to reduce welfare

benefits and restrain the growth of government spending. Littlefield v. State Department of Human Services, 480 A.2d at 739, 740.

- to promote responsible budgeting of lump-sum income by all AFDC families. Walker v. Adams, 741 F.2d at 120.

Unless this Court agrees to review the question presented in this petition, these purposes cannot be implemented evenhandedly nationwide and the existing conflict among decisions on this important question of Congressional intent and social policy will only continue with expanded disparate treatment of AFDC recipients from state to state.

B.

THE RULING BELOW CONTRAVENES ESTABLISHED STANDARDS OF REVIEW SET BY THIS COURT

In finding that petitioner's treatment of personal injury awards as income subject to the "lump sum rule" is inequitable and arbitrary and violative of 45 C.F.R. § 233.10(a)(1) (the "equitable treatment" regulation), the court of appeals overlooks established standards of review. Consequently, the decision reached by the court of appeals conflicts with prior decisions of this Court. If allowed to

stand, the court of appeals' decision will have a significant impact on the ability of state welfare executives to administer public assistance programs effectively.

The court of appeals found inequity in petitioner's application of the "lump sum rule" on two grounds. First, the court determined that, pursuant to § 305.4(C) of the ADC Manual, a personal injury award for pain and suffering was treated as income available to support an AFDC recipient's family under the "lump-sum rule," whereas a payment under a casualty policy for the loss or destruction of real or personal property was not. The court of appeals found this to be inequitable because the recipient of a payment under a casualty policy may choose not to replace the lost resource but may spend the money another way.

This application of the "lump sum rule" involves economic issues and questions of social welfare policy and does not affect freedoms guaranteed by the Bill of Rights, nor is it inherently invidious. Dandridge v. Williams, 397 U.S. 471 (1970). From a constitutional perspective then, the standard to be applied in reviewing such a rule is whether the rule advances legitimate governmental objectives in a

rational fashion. Dandridge v. Williams, Id.; Schweiker v. Wilson, 450 U.S. 221 (1981); Jefferson v. Hackney, 406 U.S. 535 (1972).

In Dandridge, this Court said:

> In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classification made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."

Dandridge v. Williams, 397 U.S. at 485.

This Court recently has restated this principle and reaffirmed that perfection in making necessary classifications is neither possible nor necessary. Schweiker v. Wilson, 450 U.S. 221 (1981). As long as the classification chosen advances a reasonable and identifiable governmental objective, courts must disregard the existence of alternative methods of classification that they might, as individuals, prefer. Id. at 234; Jefferson v. Hackney, 406 U.S. at 546.

While these cases involved the equal protection clause of the 14th Amendment rather than the "equitable treatment" regulation, 45 C.F.R. § 233.10(a)(1), the standard for review

under the regulation should be the same as the constitutional standard. In this case petitioner has advanced both legitimate governmental goals and a rational basis for the application of the "lump sum rule." As applied by Virginia, the "lump sum rule" focuses scarce public assistance funds on those who need them most, eliminates "the perverse" disincentive that encourages quick depletion of the lump sum in order to regain eligibility, and reduces spending. At the same time, the rule assures each individual the opportunity and the ability to repair or replace a loss to the extent that repair or replacement is humanly possible. Thus, for the recipient of a personal injury award, expenses related to the award are deducted; the remainder of the lump sum, representing pain and suffering or loss of earnings, is considered available to meet the family's living expenses. The possibility that someone might choose not to repair or replace damaged personal or real property for which he recovers compensation may be an imperfection, but the court of appeals' decision improperly demands mathematical equality.[9]

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[9]This Court's decision in Blum v. Bacon, 457 U.S. 132 (1982), the only case in which the "equitable treatment"

The court of appeals' second ground for its finding of arbitrariness is that the offset of expenses against the personal injury award is limited to those expenses incurred prior to and within thirty days of payment of the award, whereas a recipient who lost a tangible resource is not so limited.

Again, however, the court of appeals demands mathematical precision between individuals who find themselves in different circumstances. While it is true that an individual who has suffered a personal injury may encounter additional expenditures beyond a thirty-day period, it is impossible to predict with any degree of precision what those expenses might be. Damage to real or personal property, on the other

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regulation has been found to have been violated, provides no support for the court of appeals' decision. That case involved the State of New York's decision to exclude ADC recipients from its Emergency Assistance Program. The Secretary of HHS, in his amicus brief, took the position that New York's exclusion violated the "equal treatment" regulation. This Court, after acknowledging the strong support in the legislative history for the conclusion that ADC recipients could not be automatically excluded from the Emergency Assistance Program, deferred to the Secretary's interpretation that such section was violated. That is inapposite to the situation in the case at bar where the Secretary is in strong support of Virginia's position and finds no inequitable or arbitrary treatment.

hand, is more finite and ascertainable. To limit expenses to those incurred prior to or within thirty days of the award is a rational resolution of this difference.

Moreover, the court of appeals disregarded the changes made to the Social Security Act in July of 1984 by the Deficit Reduction Act of 1984,[10] (App. 64), which were pointed out to that court by petitioner at oral argument. This act amended 42 U.S.C. § 602(a)(17) by allowing for a reduction in the ineligibility period when an individual uses a lump-sum award to pay for medical expenses after the thirty-day period. Thus, the effect of this amendment, which Virginia has implemented, is to eliminate any disparity in treatment about which the court of appeals was concerned.[11]

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[10]Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2632(a), 98 Stat. 494, 1141.

[11]The Virginia Board of Social Services, after complying with the requirements of the State Administrative Process Act, implemented this option on September 19, 1985. (App. 78.)

VII.

CONCLUSION

For the reasons stated above, the petitioner urges this Court to grant the writ of certiorari and to reverse the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

WILLIAM L. LUKHARD,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-2167

Ona Mae Reed; Sallie Long;
Ruth Wilcher; Opal Mae Cook;
Stella King, and all others
similarly situated,

Appellees,

versus

Health and Human Services,

Appellant,

and

William L. Lukhard, Commissioner
of the Virginia Department of Welfare,

Defendant.

NO. 84-2168

Ona Mae Reed; Sallie Long;
Ruth Wilcher; Opal Mae Cook;
Stella King, and all others
similarly situated,

Appellees,

versus

Health and Human Services,

Appellant,

and

William L. Lukhard, Commissioner
of the Virginia Department of Welfare,

Defendant.

No. 84-2187

Ona Mae Reed; Sallie Long;
Ruth Wilcher; Opal Mae Cook;
Stella King, and all others
similarly situated,

Appellants,

versus

Department of Health and Human Services,
William L. Lukhard, Commissioner
of the Virginia Department of Welfare,

Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, Chief District Judge. (C/A 83-0493-R)

Argued May 6, 1985. Decided October 10, 1985

Before WIDENER and PHILLIPS, Circuit Judges and WARD, United States District Judge for the Middle District of North Carolina, sitting by designation.

Jill Hanken (Virginia Poverty Law Center; Claire Curry; Charlottesville-Albemarle Legal Aid Society; Martin Wegbreit; Client Centered Legal Services of Southwest Virginia, Inc.; Holly Peters; Legal Aid Society of Roanoke Valley; John Saxon; Virginia Legal Aid Society on brief) for Appellants; Charlotte Hardnette, Assistant Regional Attorney; Thomas J. Czelusta, Assistant Attorney General

(Gerald L. Baliles, Attorney General; John A. Rupp, Senior Assistant Attorney General; John P. Alderman, United States Attorney; Beverly Dennis, III, Regional Attorney on brief) for Appellee.

PHILLIPS, Circuit Judge:

This case is before us on cross-appeals from an order of the district court enjoining the state defendant William Lukhard, Commissioner of the Virginia Department of Welfare, from treating compensation derived from personal injuries as income for the purposes of determining eligibility for Aid to Families with Dependent Children (AFDC) benefits but denying the class of plaintiffs an award of retroactive benefits withheld under Virginia's application of the "lump sum rule" set out in 42 U.S.C. § 602(a)(17) and 45 C.F.R. § 233.20(a)(3)(ii)(D). The Department of Health and Human Services and Lukhard appeal the injury awards are not to be considered as income under the lump sum rule. The plaintiffs cross-appeal the district court's denial of retroactive benefits, its refusal to rule on a petition for attorneys fees, and the form of notice ordered to members of the class. We affirm the order of the district court in all respects.

I

The AFDC program is a cooperative federal-state assistance program established by Congress in the Social Security Act, 49 Stat. 627, codified at 42 U.S.C. §§ 601-615.

The program is administered at the state level by agencies such as the state defendant in the case at bar. The state agency develops a plan which must be approved by the federal defendant HHS. The federal government then reimburses the state for a percentage of the benefits paid and the administrative costs incurred. One element of the plan is the establishment of eligibility for benefits based on need.

In determining an applicant's eligibility the administrative agency distinguishes between income and resources. Some resources, such as a home or an automobile may be totally or partially exempt from consideration in determining an applicant's need for benefits. See 45 C.F.R. § 233.20(a)(3)(i). Cash may be considered as a resource in some instances and may be included in the $600 maximum of non-exempt resources which are not considered in determining eligibility in Virginia. The distinction is important because all income is considered in the eligibility assessment.

Before 1981, lump sums of money from whatever source were treated as income in the month of receipt and as a resource in succeeding months. Congress changed that treatment with the passage of the "lump sum rule" as part of

the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 357 (1981), pertinent provision codified at 42 U.S.C. § 502(a)(17). The lump sum rule provides that lump sum income is to be considered in determining eligibility for a number of months calculated by dividing the amount of the lump sum income by the state's monthly standard of need. Thus, if the state's standard is $300 per month, a $15,000 payment would render the applicant ineligible for 50 months. See 45 C.F.R. § 233.20(a)(3)(ii)(D).[1]

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[1] 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983) states as follows:

Net income, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance. When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of non-recurring lump sum income, the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility shall begin with the month of receipt of the non-recurring income or, at State option, as late as the corresponding payment month. For purposes of applying the lump sum provision, family includes the AFDC assistance unit and any other individual whose lump sum income is counted in determining

Virginia initially implemented the rule by considering lump sums from any unearned source, including insurance settlements, as lump sum income. Joint Appendix at 143. The Virginia regulation was subsequently amended to provide that money derived from the conversion of an exempted resource into cash was not to be treated as lump sum income. Joint Appendix at 37. A later amendment broadened the regulation's scope to conversion of any real or personal property, whether an exempt resource or not, into cash. Joint Appendix 27-30, 37. Thus, a payment under a fire insurance policy covering a recipient's home or personal property would be considered a resource, rather than lump sum income, and would not affect the recipient's eligibility once the cash had dissipated below the allowable resource level. A settlement or damage award from personal injury, however, continued to be treated as lump sum income.

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the period of ineligibility. A State may shorten the period of ineligibility where it finds that a life-threatening circumstance exists, and the non-recurring income causing the period of ineligibility has been or will be expended in connection with the life-threatening circumstance. Further, until that time the non-recurring income must have been used to meet essential needs and currently the assistance unit must have no other income or resources sufficient to meet the life-threatening circumstance.

This action brought under 42 U.S.C. § 1983 and 5 U.S.C. 701, was filed by three named plaintiffs in June 1983 to challenge the treatment of personal injury awards as lump sum income.[2] The district court granted the plaintiffs a preliminary injunction prohibiting further application of the lump sum rule against them. In December 1983 two more plaintiffs were allowed to intervene, and the injunction was extended to grant them relief.

On the merits of the case, the district court granted the plaintiffs' motion for summary judgment, holding that the treatment of personal injury awards as lump sum income was unreasonable. It certified the action as a class action under Rule 23 of the Federal Rules of Civil Procedure and ordered further proceedings to determine appropriate relief. The federal defendant appealed.

After an evidentiary hearing, the district court entered a permanent injunction against treating compensation

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[2]The plaintiffs, Ona Mae Reed, Sallie Long, and Ruth Wilcher each received personal injury awards and were declared ineligible for benefits. Each alleged that her funds were spent on necessary living expenses and household items before the period of ineligibility ceased.

for personal injury as lump sum income and ordered the defendants to pay current benefits to named plaintiffs and to members of the class, but denied plaintiffs' request for retroactive payment of benefits. The district court ordered that notice of the decision be given to members of the class.[3] All relief except payment of current benefits to the named plaintiffs was stayed pending appeal, and the court made no

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[3]The court order provided in part as follows:

> Defendant Lukhard will cause individual notice to be sent by mailing to the last known address of those persons listed on the computer "snapshots" (one such "snapshot" taken in July, 1983, and one to be taken within fifteen (15) days of the entry of this order) whose benefits were denied or terminated due to personal injury awards. Said notice shall be approved by the court prior to mailing.
>
> Defendant Lukhard will cause notice of this decision to be published once a week for four (4) weeks in no fewer than four (4) regional newspapers in Virginia, one of which must be the Richmond newspaper.
>
> Defendant Lukhard will cause notice of this decision to be posted in each local office of the Virginia Department of Social Services and of the Virginia Department of Health. Said notice shall remain posted for a period of at least sixty (60) days.

Jt. App. 190-91.

ruling on plaintiffs' petition for attorneys fees and costs. These appeals followed.

II

We affirm the grant of summary judgment to the plaintiffs on the primary question whether personal injury awards are "income" for the purpose of applying the "lump sum" rule set forth in 42 U.S.C. § 602(a)(17). The facts in this case were not disputed, thus the case was before the district court on a question of law - the construction of the statute.

Neither the statute itself nor the implementing regulation defines "income." The starting point for construing the statute is therefore an examination of the ordinary meaning of the undefined term; "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981), citing Perrin v. United States, 444 U.S. 37, 42-43 (1979). Taking that as its starting point, the district court held that personal injury awards would not be considered "income" as that term is ordinarily understood. Reed

v. Lukhard, 591 F. Supp. 1247, 1256 (W.D. Va. 1984). Personal injury awards serve to make one whole, in effect restoring one to the status quo before the injury was suffered. See Lilley v. Simmons, 200 Va. 791, 108 S.E.2d 245 (1959); 22 Am. Jur. 2d, Damages § 85 (1965). Income on the other hand represents a "gain or profit," 42 C.J.S. Income (1944), and is ordinarily understood to be a return on the investment of labor or capital, thereby increasing the wealth of the recipient. See Blacks Law Dictionary 687 (5th ed. 1979); see also Eisner v. Macomber, 252 U.S. 189, 207 (1919).

The defendants argue that the district court erred in looking to contexts other than the AFDC program for a definition of income. We disagree. As we noted, the AFDC statute does not define income. While other statutes' definitions do not control our inquiry, it is instructive that Congress as well as the Department of Health and Human Services and other agencies have defined income in other contexts to exclude personal injury awards. See 26 U.S.C. § 104 (defining income for federal income tax purposes); 7 C.F.R. § 273.9(c)(8) (Department of Agriculture Food Stamp Program); 48 Fed. Reg. 7010-11 (Feb. 17, 1983) (annual

poverty guidelines promulgated by HHS). These definitions indicate the meaning that has come to be associated with income, and in light of the absence of a definition within the AFDC statute, we believe they give the best indication of the meaning intended by Congress in this context.

We do not lightly adopt an interpretation of the statute contrary to the interpretation advanced by the agency. Courts must give deference to the agency's interpretation of its own regulations; we may not reject the agency's interpretation simply because it is not the one we would reach. See Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Fairfax Nursing Center v. Califano, 590 F.2d 1297, 1301 (4th Cir. 1979). Our review, however, cannot be so blind and uncritical as to become a rubberstamping of the agency's interpretation; "administrative interpretations of statutory terms are given important but not controlling significance." Batterton v. Francis, 432 U.S. 416, 424 (1977); see also Volkswagenwerk A.G. v. Federal Maritime Commission, 390 U.S. 261, 272 (1968). In this case we reject the agency's interpretation because we believe it conflicts with Congress' intent and because its disparate treatment of personal injury awards is

inequitable and thus contrary to HHS' own guidelines. See 45 C.F.R. § 233.10(a)(1).

The legislative history indicates that Congress was concerned that AFDC recipients were encouraged by the treatment of large sums of money as resources to spend the money quickly in order to remain eligible for benefits. By promulgating the lump sum rule, Congress hoped to encourage recipients to budget large sums to meet needs over a longer period of time, thereby easing the burden on the public fisc. See S. Rep. No. 97-139, 97th Cong., 1st Sess. 437, reprinted at 1981 U.S. Code Cong. & Ad. News 396, 702; Bell v. Massinga, 721 F.2d 131 (4th Cir. 1983). However the legislative history did not indicate any intent to redefine income. The committee report states:

> Under present law, any payments that meet the definition of income (e.g., retroactive social security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered a resource in the months thereafter.
>
> The committee amendment would require that large payments, together with other income remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program.

1981 U.S. Code Cong. & Ad. News at 702. We believe that this language unmistakably reveals Congress' intent to reach only those payments in the OBRA lump sum rule which would ordinarily be considered income, not all large payments of money. But see Walker v. Adams, 741 F.2d 116 (6th Cir. 1984). As the ordinary meaning of income does not in our view extend to personal injury awards, we find no legislative intent to extend the lump sum rule to such awards.

Nor do we believe that OBRA gave HHS the authority to allow states the option of treating personal injury awards differently than other payments for loss. Virginia treats a payment made pursuant to a casualty policy for loss of a home or a car as a resource but does not so treat a payment for loss incurred due to injury. The defendants assert that this treatment is consistent since the plaintiff may reduce the amount of the award treated as income by offsetting against it sums expended for medical care, legal fees, and other expenses caused by the injury prior to and 30 days after the money is received. Implicit in this assertion is the assumption that casualty loss payments will by necessity be used to replace the resource. We are not persuaded.

The effect of such treatment is to place a restriction on the injured recipient who cannot go into the market to replace his loss due to the nature of pain and suffering while the recipient who can go into the market to replace his lost resource, but chooses not to do so, is not so restricted. Moreover, the offset rule imports a time limitation into actual replacement of the loss due to injury that is not imposed on the replacement of other resources. Most important, this time limitation carries with it an element of arbitrariness since all the expenses due to personal injury may not accrue within the 30 days following receipt of the funds. Thus, actual replacement due to latent consequences of the injury and to permanent consequences requiring future expenditure simply falls outside the allowable offset period. This effect is inequitable and puts the injured recipient in an untenable position when compared to the recipient who has lost a more concrete and tangible resource. The AFDC program was designed to assist the needy; the state by imposing inequitable eligibility requirements thwarts that purpose and runs afoul of regulations aimed at ensuring fair and unarbitrary treatment. See 45 C.F.R. § 233.10(a)(1).

Therefore, we hold that the lump sum rule may not be applied to personal injury awards to render AFDC recipients ineligible for benefits. Accordingly, the judgment for the plaintiffs is affirmed.

III

The plaintiffs appeal the judgment of the district court denying corrective payments of benefits which the plaintiffs would have been entitled to but for the application of the lump sum rule. The district court ruled that the eleventh amendment precluded such payments, citing Pennhurst State School and Hospital v. Halderman, __ U.S. __, 104 S. Ct. 900 (1984) (Pennhurst II). We agree and affirm.

Pennhurst II reaffirmed the holding of Edelman v. Jordan, 415 U.S. 651 (1974). In Edelman, the plaintiffs sought to enjoin officials from the Illinois Department of Public Aid from administering the federal-state Aid to the Aged, Blind, or Disabled program in a manner inconsistent with federal regulations and the fourteenth amendment. The Supreme Court affirmed the injunction but held that retroactive payment of benefits was barred by the eleventh amendment. The Court stated:

> While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Edelman, 415 U.S. at 668. The Court went on to hold that

> [t]hough a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury.

Id. at 677 (citations omitted).

The appellees assert that their case differs from Edelman, despite the almost identical fact pattern, in that Congress has since enacted 42 U.S.C. § 602(a)(22) which reqires that a state AFDC plan must provide that "the state agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan." Underpayment is defined as "a financial assistance payment ... which is less than the amount for which the assistance unit

was eligible, or failure by the State to issue a financial assistance payment for the payment month to an eligible assistance unit if such payment should have been issued." 45 C.F.R. § 233.20(a)(13)(ii). Thus, assert appellees, the award of retroactive benefits is ancillary to the injunctive relief as prospective compliance with the federal statute and is therefore within the prospective compliance exception to the eleventh amendment bar. See Milliken v. Bradley, 433 U.S. 267 (1977).

The award of retroactive benefits sought here is distinguishable from the relief granted in Milliken. In Milliken, the Court ordered the defendants to implement remedial education programs as an adjunct to desegregating the Detroit public school system. The Supreme Court affirmed this relief, ruling that ordering the necessary expenditure of funds for the programs was within the federal courts' remedial powers since the expenditure was ancillary to the defendants' compliance in the future with the court's order to "conform their conduct to requirements of federal law." Id. at 289. In the case at bar the injunctive relief requires the defendants in the future to refrain from treating

personal injury awards as income. Compliance with this order obviously will require further expenditures of state funds to make assistance payments that would not otherwise have been made. The retroactive benefits sought, however, cannot be seen as an adjunct of the court ordered prospective relief, but could only constitute redress for past violations of federal law. As such the award would be indistinguishable from damages. Edelman squarely holds that such relief is outside the remedial power of the federal courts.

IV

We find no merit to plaintiffs' assertion that the district court erred in failing to order the mailing of individual explanatory notices of the judgment to all members of the plaintiff class. The district court ordered such notice to those members of the plaintiff class who could be ascertained from computer records maintained by the state defendants. As plaintiffs point out, the method of ascertaining ineligible recipients from the computer records would not reveal a substantial number of potential members of the class, particularly those who had been ineligible for a period of time prior to the present action but who had become eligible again

before July 1983. However, the district court also ordered publication of notice for four weeks in no less than four Virginia newspapers, including one in Richmond, and the posting of notice in all local offices of the Virginia Department of Social Services and the Virginia Department of Health.

The district court has wide discretion in fashioning the notice "best calculated to reach [the plaintiff class] without imposing an unreasonable burden on the state." Fabula v. Buck, 598 F.2d 869, 874 (4th Cir. 1979); see also Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979). The Supreme Court held in Quern v. Jordan, 440 U.S. 332 (1979), that requiring individual notice does not violate the eleventh amendment, but of course did not require such notice to class members in all cases. We find no abuse of discretion in the form of notice ordered here as the mailing of notice to identifiable class members was supplemented by posted notice and publication.

V

Lastly we find no merit to plaintiffs' contention that the district court erred in refusing to rule on their petition

for attorneys fees. Though appellate review of such an award or denial of award may best be done on appeal of the merits of the case, see Wright v. Jackson, 522 F.2d 955 (4th Cir. 1975), a district court may properly defer ruling pending ultimate resolution of the merits, hence determination of the prevailing party question. See Anderson v. Morris, 500 F. Supp. 1095 (D. Md. 1980); accord Dickerson v. Pritchard, 551 F. Supp. 306 (W.D.Ark.), aff'd, 706 F.2d 256 (8th Cir. 1983).

VI

For the foregoing reasons, we find no error in the judgment of the district court and affirm it in all respects.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ONA MAE REED, ET AL.,	)	CIVIL ACTION
	)	NO: 83-0493
PLAINTIFFS,	)	
	)	MEMORANDUM OPINION
v.	)	
	)	By James C. Turk
WILLIAM LUKHARD, ET AL.,	)	Chief U. S. District Judge
	)	
DEFENDANTS.	)	

PROCEDURAL POSTURE

This case is before the court on cross-motions for summary judgment. Plaintiffs Ona Mae Reed, Sallie Long, and Ruth Wilcher instituted this action on June 6, 1983 on their own behalf and on behalf of a proposed class of persons similarly situated. They seek injunctive and declaratory relief pursuant to 5 U.S.C. § 701-706 and 42 U.S.C. § 1983 in connection with the termination of benefits under § 602(a)(17) of the Aid to Families with Dependent Children Program

(AFDC).[1] Jurisdiction is predicated on 28 U.S.C. §§ 1331 and 1343.

After a hearing on plaintiffs' motion for a preliminary injunction this court entered an order on June 28, 1983 enjoining the defendants from applying the "lump sum" income rule of 45 C.F.R § 233.20(a)(3)(ii)(D) and ADC Manual § 305.4(c) to all three named plaintiffs.[2] Plaintiffs' request for a preliminary injunction as to the proposed class was, however, denied. Reed v. Lukhard 578 F. Supp. 40, 45 (W.D. Va. 1983). On August 1, 1983, the court ordered joinder of the Secretary of HHS as a necessary defendant. Thereafter, the court granted the motions of Opal Mae Cook and Stella King for intervention as individual plaintiffs. The matter is

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[1] The program is administered by the defendant Heckler, Secretary of the Department of Health and Human Services (HHS), at the federal level and by the defendant Lukhard as Commissioner of the Department of Social Services, at the state level. See § 63.1-86 et. seq., Code of Virginia (1950). Regulations governing the AFDC Program in Virginia are found in ADC Manual § 201 et. seq.

[2] 45 C.F.R. § 233.20(a)(3)(ii)(D) is the federal regulation implementing § 602(a)(17): § 305.4c is the state implementing regulation. See supra notes 3 & 4 for full text.

now ripe for summary judgment and for disposition of plaintiffs' motion for class certification.

STATEMENT OF FACTS

In 1981, Congress enacted the Omnibus Budget Reconciliation Act, Pub. L. 97-35 which amended the ADCF (sic.) Program, 42 U.S.C. § 601 et. seq. Section 602(a)(17) was added, which changed the treatment of lump sum payments received by AFDC applicants or recipients. Prior to enactment of this section, if an AFDC assistance unit received nonrecurring lump sum funds they were considered "income" in the month of receipt and the recipient was rendered ineligible for AFDC benefits. Once the funds were reduced to the state's standard of need and the recipient was otherwise eligible for AFDC, the assistance unit would be reinstated on the AFDC rolls. This new section requires state AFDC plans to provide for a period of ineligibility for AFDC recipients as follows:

> A State plan for aid and services to needy families with children must . . . (17) provide that if a person specified in [§ 602 8(a)(i) or (ii)] receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member-

> (A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such a family, and (B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A).

§ 602(a)(8), which is incorporated by reference into § 602(a)(17) specifies:

> that, with respect to any month, in making the determination [of need] under [§ 602(a)(7)], the State agency --
>
> (i) shall disregard all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or a part-time student who is not a full-time employee attending a school, college or university, or a course of vocational or technical training designed to fit him for gainful employment;
>
> (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same house as such relative and child) whose needs are taken into account

> in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month).

Pursuant to 45 C.F.R. § 233.20(a)(3)(ii)(D)[3], the federal

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[3] 45 C.F.R. § 233.20(a)(3)(ii)(D) provides as follows:

> Net income, except as provided in paragraph (a)(3)(xii) of this section, and resources available for current use shall be considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance. When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring lump sum income, the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility shall begin with the month of receipt of the nonrecurring income or, at State option, as late as the corresponding payment month. For purposes of applying the lump sum provision, family includes the AFDC assistance unit and any other individual whose lump sum income is counted in determining the period of ineligibility. A State may shorten the period of ineligibility where it finds that a life-threatening circumstance exists, and the nonrecurring income causing the period of ineligibility has been or will be expended in connection with the life-threatening circumstance. Further, until that time the nonrecurring income must have been used to meet essential needs and

defendant's regulation implementing § 602(a)(17), all recipients of nonrecurring lump sum income from any source are subject to the lump sum rule. The state defendant has adopted this interpretation in § 305.4c, Virginia ADC Manual[4].

Plaintiffs challenge the defendants' treatment of nonrecurring lump sum compensation for personal injuries on two grounds. First, they contend that the statutory language of § 602(a)(8) clearly excludes from the period of ineligibility specified in § 602(a)(17) those AFDC recipients who have no

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currently the assistance unit must have no other income or resources sufficient to meet the life-threatening circumstance.

4. Lump Sum Payments - The receipt or expected receipt (during the prospective cycle) of a nonrecurring lump sum payment such as the accumulation of benefits for a prior period, earned income tax credit refund, an insurance settlement, loans for current living expenses or from any other unearned source, must be prorated and reflected as income when the lump sum plus all other net countable income exceeds the standard of need (100 percent) in the month of receipt.
Monies received from THE SALE OR CONVERSION OF ANY REAL OR PERSONAL PROPERTY are not considered a lump sum. (See Section 303.3)
In situations where a child receives a lump sum, the option to exclude the child and the income is prohibited. Lump sum payments received by any member of the assistance unit must be used to establish continued eligibility or ineligibility of the unit.

earned income in the month of reciept of a personal injury award. Second, they maintain that since money received in compensation for personal injuries merely restores the injured party to the status quo, it does not constitute "income" within the meaning of the lump sum rule. According to plaintiffs, such funds must be treated as "resources," which would render the recipient ineligible for benefits only as long as total resources exceeded the state's standard of need for the family.[5] Under the defendants' current treatment as "income" subject to the lump sum rule, the period of ineligibility varies depending on the amount of the lump sum and continues for a time certain, regardless of when the funds are exhausted.

A full statement of the facts surrounding the three original plaintiffs' claims appears in this court's opinion of June 28, 1983 and will not be repeated here. See 578 F. Supp. at 41, 42. It is sufficient to note that of the five named plaintiffs, four received nonrecurring lump sum income from personal injury awards which resulted in the establishment of

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[5] See 42 U.S.C. § 602(a)(7)(B); 45 C.F.R. § 233.20(a)(3)(i)(B); ADC Manual § 303.2(E).

a period of ineligibility for AFDC benefits. The remaining plaintiff Reed, received a worker's compensation award and was similarly ineligible for AFDC benefits. For all plaintiffs, the lump sums were allegedly exhausted before the expiration of their respective periods of ineligibililty.

Before proceeding to a disposition of the summary judgment issues the court will address plaintiffs' motion for class certification.

CLASS CERTIFICATION

Plaintiffs contend that since defendants' policies are in effect throughout the Commonwealth, class relief is the only appropriate vehicle for vindication of their rights. They seek a classwide injunction enjoining defendants from applying the lump sum rule to AFDC recipients without earned income and to recipients of personal injury awards, as well as a classwide declaration of plaintiffs' rights to reimbursement of benefits improperly denied beginning October 1, 1981. Plaintiffs further assert that should the court determine that their AFDC benefits were unlawfully terminated or reduced after October 1, 1981, appropriate relief would include issuance of a notice to all class members informing them of the court's

decision and advising them of any state administrative procedures available for reimbursement of benefits improperly denied.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, a class may be certified by the court if it meets the four criteria of subsection (a) which requires that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, at least one of the conditions set forth in subsection (b) must be fulfilled in order to maintain a class action. Plaintiffs invoke subsection (b)(2) as applicable to their case. That section provides for classwide relief if:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

For the reasons stated, the court believes that classwide relief is necessary and appropriate, but that the class, as drawn by the plaintiffs, is overinclusive. Therefore, the court

will certify the following class of individuals in this case:

> All those persons in Virginia whose benefits, since 10-1-81, have been, continue to be, or will be denied, reduced, or terminated solely because of the "lump-sum" policies set out at 45 C.F.R.§ 233.20(a)(3)(ii)(D) and at ADC Manual § 305.4c whose "lump-sum" was or will be derived from compensation for personal injuries.

Neither the plaintiffs nor the state defendants have been able to determine the exact number of cases where the denial or termination of AFDC benefits was based solely on the receipt of personal injury awards or settlements. The record indicates, however, that from October 1, 1981 through August 1983 at least 669 AFDC cases were terminated and 100 applications for benefits were denied because of the lump sum rule. See Defendants' Responses to Interrogatories. The record also reflects that approximately 231 AFDC cases are terminated annually in Virginia because of lump sum insurance settlements from insurance policies not owned by the AFDC assistance unit. See Plaintiffs' Reply Brief In Response To Defendants' Briefs In Opposition to Plaintiffs' Motion For Class Certification, Exh. 1. While the plaintiffs have the burden of demonstrating the existence of a class whose bounds are precisely drawn, Cape Henry Bird Club v.

Laird, 484 F.2d 453 (4th Cir. 1973), they are not required to specify the exact number of potential class members. Marshall v. Electric Hose and Rubber Co., 41 F.R.D. 377, 384 (S.D. N.Y. 1966). Moreover, "where the plaintiff has demonstrated that the class of persons he or she wishes to represent exists, that they are not specifically identifiable supports rather than bars the bringing of a class action, because joinder is impracticable." Doe v. Charleston Area Medical Center, Inc., 529 F.2d. 638, 645 (4th Cir. 1976). Joinder of all members of the class is impracticable because of the present administrative difficulty in identifying AFDC recipients whose benefits have been denied or terminated because of the lump sum rule. Thus, the record in this case contains ample evidence that the proposed class satisfies the requirement of numerosity.

With regard to the remaining requirements of Rule 23, it is clear that common questions of law or fact exist with respect to the class as drawn by the court: the identical statutory rights of all members of the class have been allegedly violated by the defendants' "lump-sum" policies. Each of the five plaintiff representatives received the lump sum funds

as compensation for personal injuries suffered either by herself or by her children making their claims typical of the claims of the class. Each of the five plaintiff representatives has suffered loss of AFDC benefits. This personal stake in the outcome of the case ensures zealous pursuit of the action such that the rights of the class are certain to be protected. Rodriguez v. Swank, 318 F. Supp. 289, 294 (N.D. Ill. 1970), aff'd 403 U.S. 901 (1971). The court finds, therefore, that the four requirements of Rule 23(a) have been satisfied. Furthermore, it is clear that the defendants have acted on grounds generally applicable to the class such that 23(b)(2) is also satisfied.

The defendants contend that even if Rule 23 is satisfied, the court should not allow maintenance of the case as a class action because it is unnecessary to do so. They argue that the court should deny class certification because relief can be granted in such a way as to benefit not only the claimants, but also all other persons subject to the policies under attack. Sanford v. R.L. Coleman Realty Co., Inc., 573 F.2d 173 (4th Cir. 1978). It is the defendants' position that if the requested declaratory and injunctive relief is entered in favor

of the individual plaintiffs the state would then offer the relief granted to any eligible persons in the proposed class. As a result, no plaintiff class is needed. The court does not agree.

While injunctive and declaratory relief will often inure to the benefit of all members of a proposed class without class certification, such is not the case here. The class as defined by the court includes individuals who have been denied eligibility or have been terminated from the AFDC Program because of defendants' policies. A declaration that those policies are unlawful, as well as an injunction against future application of the lump sum rule, will afford no relief to individuals who have been denied AFDC in the past unless they are notified of the court's decision that they were improperly denied benefits. Without such notification, it is unlikely that those individuals would be informed that they could seek retroactive AFDC benefits either through state administrative procedures or through state courts.[6]

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[6]. No monetary relief, such as retroactive AFDC benefits, can be awarded by this court pursuant to the eleventh amendment. Edelman v. Jordan, 415 U.S. 651 (1974).

The United States Supreme Court has addressed the necessity of this type of notice in Quern v. Jordan, 440 U.S. 332 (1979). The Court held that the eleventh amendment did not bar a federal court from ordering a state to advise class members of the outcome of the case and of the availability of state administrative procedures. In a similar situation[7], this court previously found that explanatory notice of the type requested here was appropriate and necessary. Quoting Quern, the court reasoned that:

> such notice "in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue." Whether class members would have to pursue administrative remedies, file a court action, or seek legislative assistance is not relevant to the propriety of notifying plaintiffs of their . . . rights. These are matters of state law which contain "numerous missing links, which can be supplied, if at all, only by the state and members of the plaintiff class and not by a federal court."

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7. Randall v. Lukhard involved Virginia's transfer of assets rule, which disqualified medicaid applicants or recipients who had transferred property to other persons for less than fair market value. In a class action, plaintiffs sought declaratory and injunctive relief.

Randall v. Lukhard, 536 F. Supp. 723, 731 (W.D. Va. 1982), aff'd in part and rev'd in part, 709 F.2d 257 (4th Cir. 1983) (Citations omitted.)

Accordingly, the plaintiffs' motion for class certification, as modified by the court, will be granted.[8]

THE LUMP SUM RULE AS APPLIED TO AFDC RECIPIENTS WITHOUT EARNED INCOME

Plaintiffs' first challenge to the defendants' treatment of lump sum compensation for personal injuries is one of statutory construction. They assert that the statutory provision of 42 U.S.C. § 602(a)(17) plainly limits the rule to

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8. The defendants' cite a number of cases for the proposition that class certification is not necessary in this case. See Memorandum in Support of Federal Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs's Motion For Summary Judgment And For Class Certification. Unlike the instant case, however, these cases involve situations where injunctive and declaratory relief would provide full relief to all members of a proposed class without class certification. For example, in Sandford v. R.L. Coleman Realty Co., Inc., 573 F.2d 173 (4th Cir. 1978), the court of appeals decided that the need for class certification would disappear upon entry of an injunction "in favor of the plaintiff . . . and any other blacks who, in the future, may be denied equal access to housing under the defendants' control." Id. at 179. The plaintiffs in Sandford were seeking prevention of future wrong to a class members, while plaintiffs here seek not only a correction of future wrong, but also a correction of past wrongs for individuals already denied benefits.

families with earned income at the time they received their lump sum. In support of this claim, plaintiffs point to the relationship between § 602(a)(17) and § 602(a)(8)(A)(i) and (ii). More specifically, plaintiffs posit that § 602(a)(17) sets out the lump sum rule and then limits its application to "a person specified in paragraph 8(a)(i) or (ii); that the persons so specified are only those with earned income; and therefore, the lump sum rule applies only to those AFDC recipients with earned income. The defendants argue that 8(a)(i) and (ii) merely describe categories of AFDC recipients covered by the lump sum rule, and then specifies treatment for any earned income which they may have. Both plaintiffs and defendants maintain that the statute, by its literal terms, clearly supports their respective positions. The court previously addressed this issue in its opinion on plaintiffs' motion for a preliminary injunction. The court found then that:

> Plaintiffs' position . . . is nothing but wishful thinking. If anything is to be decided from reading those two provisions in isolation, it would have to be in favor of the defendants' contentions: § 602(a)(8)(A)(i) and (ii), without question, set forth certain categories of recipients, and then provide that certain portions of the "earned income" of those recipients be disregarded in making eligibility and need determinations under § 602(a)(7). It does not

> necessarily follow that the category of recipients set forth in § 602(a)(8)(A)(i) and (ii), as incorporated by § 602(a)(17), includes only those having earned income; to argue that it does suggest[s] an uncritical reading of the provisions.

578 F. Supp. at 43-44.

Mindful of the liberal standard for granting a preliminary injunction,[9] the court cited Sweeney v. Affleck,[10] and Faught v. Heckler,[11] as demonstrating that plaintiffs had a colorable chance of prevailing on the merits sufficient to warrant the imposition of preliminary injunctive relief upon defendants. 578 F. Supp. at 44 (citations omitted). In Sweeney the district court granted summary judgment for a class which consisted of former AFDC recipients whose benefits were terminated for a specified period of time following receipt of

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[9]. In determining whether to issue a preliminary injunction, the court must "balance the hardships" by considering the "flexible interplay" among four factors: "the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; the likelihood of harm to the defendant if the requested relief is granted; the likelihood that plaintiff will succeed on the merits; and the public interest." Federal Leasing v. Underwriters at Lloyd's, 650 F.2d 495, 499 (4th Cir. 1981).

[10]. 560 F. Supp. 1118 (D.R.I. 1983).

[11]. No. 83-66-A (S.D. Iowa April 5, 1983).

lump sum income in a month when they had no earned income. The court found that the statutory language, the legislative history, and the purpose of the AFDC program supported plaintiffs' restrictive reading of the scope of the lump-sum rule. 560 F. Supp. 1118. The court in Faught likewise granted preliminary relief to plaintiffs. See 577 F. Supp. 1180 at 1184. These cases no longer lend support to plaintiffs' position here on summary judgment.

On April 27, 1984, the Court of Appeals for the First Circuit reversed the district court in Sweeney.[12] After an extensive analysis of the relevant statutory language, the court of appeals held that "the . . . language itself could support either [plaintiff's or defendant's] construction, but not without some strain." 732 F.2d at 1027. The court found it necessary, therefore, to review the legislative history and administrative interpretations of the statute. The court then concluded that

> [t]he legislative history of 42 U.S.C. § 602(a)(17) is as clear as its language is ambiguous. Committee reports reveal that Congress had two

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12. Sweeney v. Murray, 732 F.2d 1022, 1030 (1st Cir. 1984).

> major motives in amending subsection (a)(17): to promote responsible budgeting of lump-sum income by all AFDC families and to reduce AFDC disbursements by a specified amount based on calculations that had assumed application of the lump-sum rule to all AFDC families, not only to those AFDC families with earned income.

In light of the decision in Sweeney, the court is likewise of the opinion that the language used by Congress in enacting the lump-sum rule at 42 U.S.C. § 602(a)(17) is ambiguous. For the reasons given in Sweeney, the court concludes that the defendants' interpretation that the statute applies to AFDC recipients regardless of whether they have earned income is consistent with the legislative history and will not be disturbed.[13] The court does not agree, however, with defendants' position that the statute is inclusive of lump sum compensation for personal injuries.

LUMP SUM COMPENSATION FOR PERSONAL INJURIES AS "INCOME"

Plaintiffs maintain that the lump sum rule should not be applied to awards for personal injuries because the term

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13. See also Callejas v. McMahon, No. C-83-3136 EFL (N.D. Ca. Sept. 2, 1983) at 4-5; accord; Faught v. Heckler, 577 F. Supp. 1180 (S.D. Iowa 1983); Betson v. Cohen, 578 F. Supp. 154 (E.D. La. 1983).

"income," as used in the statute, is not inclusive of awards which merely compensate plaintiffs for losses suffered. Plaintiffs argue that by receiving monetary compensation for personal injuries the recipient has merely exchanged one resource, a whole and healthy body, for another. There has been no gain, thus no income. They point to defendants' own definition of "resource" in support of this position. That is, Virginia's ADC regulations on "resources" provide that the sale or conversion of real or personal property is not counted as lump sum income. ADC Manual §§ 303.3 and 305.4C. These state regulations track the federal policy of treating as a resource the conversion of a non-liquid asset into cash. 47 Fed. Reg. No. 25 at 5657. Plaintiffs complain that the defendants' failure to similarly treat compensation for personal injuries leads to the following unconscionable results:

> Ex. 1. Ms. H and her two children live in Roanoke and receive $255 AFDC each month. If Ms. H's home burns down and she receives a $20,000 insurance award, she may spend the insurance proceeds on anything she wants and as quickly as she wishes. She can reestablish her AFDC eligibility as soon as her countable resources fall below $600.
> However, if Ms. H's body is burned in a fire, and she receives $20,000 to compensate her loss, the money is treated as lump sum income. Ms. H and her children are disqualified from the

> AFDC program for almost 6 years. [20,000 divided by 283 (the standard of need) = 70.67 months], even if the money is expended before that period ends.
>
> Ex. 2. Ms. H's youngest child, Johnnny, is hit by a car and injured. Ms. H's insurance company pays Johnny for $1000 for his injuries. The family can qualify for AFDC when their available resources fall below $600. On the other hand, if the driver's insurance company pays Johnny for his injuries, the money is treated as lump sum income and the family is disqualified from AFDC for 3 months and their benefits in the 4th month are reduced to $104. ($1000 divided by 283 = 3.5 months. $151 of the lump sum remains in the 4th month and is subtracted from the $255 payment.)

Plfs. Memo in Support of Motion for Summary Judgment at 27. Plaintiffs submit that it is irrational to afford more favorable treatment to the damage of a material resource, such as a car or a home than that afforded the damage to one's body and that Congress did not intend such an application of the lump sum rule. Defendants take the position that Virginia's treatment of personal injury awards is not inconsistent with any AFDC statutory or regulatory provision and urge the court to uphold their interpretation of the statute as a reasonable exercise of exceutive discretion.

The Standard of Review

The applicable standard of review, 5 U.S.C. § 706(2), the Administrative Procedure Act, provides that

> the reviewing court shall set aside agency action, findings, and conclusions found to be (A) arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law . . . .

Camp v. Pitts, 411 U.S. 138 at 142 (1973).

This standard is a highly deferential one, presuming agency action to be valid. Citizens to Preserve Overton Park v. Volpe, 410 U.S. 402 (1971); Batterton v. Francis, 432 U.S. 416 (1977). While the court is not permitted to substitute its judgment for that of the agency, this does not mean that the court must rubber-stamp the agency's interpretation as correct. To do so would render the review process superfluous. Ethyl Corp. v. Environmental Protection Agency, 514 F.2d 34 (D.C. Cir. 1976). Therefore, when reviewing the propriety of the defendants' interpretation of the lump sum rule the court will reject the regulatory scheme only if it finds that it lacks a reasonable basis. Connor v. Finch, 314 F. Supp. 364, 369 (N.D. Ill. 1970); Dandridge v. Williams, 397 U.S. 471 (1970). Mindful of this limited review, and for the reasons stated, the court concludes that it is unreasonable to

apply the lump sum rule to nonrecurrng lump sum compensation for personal injuries. The language of § 602(a)(17) clearly applies the extended disqualification provision of the lump sum rule to "income" and not to "resources:"

> When an ADC recipient receives in any month an amount of income which, together with all other income . . . exceeds the state's standard of need . . . [the family is ineligible for further aid for a period equal to the number of months computed by dividing the lump sum, and other income, by the state's monthly ADC standard of need]. (emphasis supplied).

The federal implementing regulation in question also applies specifically to "income."[14] "Income" is not, however, expressly defined in the statute or in the regulation. The legislative history accompanying the lump sum amendment also fails to define the term. It is, however, instructive to note that in considering the appropriate statutory language the Senate Finance Committee commented as follows:

> Under present law, any payments that meet the definition of income (e.g., retroactive social security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered a resource in the months thereafter.
> The committee amendment would require that

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14. See supra note 3 at 4.

> large payments, together with other income remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program. If such income exceeds the standard of need, the household would be ineligible for aid.

1981 U.S. Code Cong. & Ad. News 693 at 702.

In the court's opinion, this language strongly supports plaintiffs' position that Congress did not intend to include compensation for personal injuries in the lump sum rule. The explicit reference to "payments that meet the definition of income" compels the conclusion that Congress contemplated the existence of lump sum payments which do not constitute "income." Likewise, the language which links "large payments together with other income" reinforces this conclusion. To say that Congress meant to define all lump sums as "income" would fly in the face of the inferences which are reasonably drawn from these express references and would render them superfluous. The court can find nothing in the record to warrant such a finding. Furthermore, it is a fundamental canon of statutory construction that where Congress uses terms that have accumulated settled meaning under either equity or common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorpo-

rate the established meaning of the term. NLRB v. Amax Coal Co., 453 U.S. 322 (1981); accord; Perrin v. United States, 444 U.S. 37, 42 (1979); Malat v. Riddell, 383 U.S. 569 (1966); Richard v. United States, 369 U.S. 1 (1962). The court is of the opinion that the established, common meaning of "income" does not encompass compensation for personal injuries.

The logical starting point for the common, established meaning of "income" is the dictionary:

> Income - the amount of money or its equivalent received during a period of time in exchange for labor or services, from the sale of goods or property, or as profit from financial investments.

American Heritage Dictionary, 2d Ed. Black's Law Dictionary, 5th Ed. defines income as

> "the return of money from one's business, labor, or capital invested; gains, profits, salary, wages, etc. . . . The true increase in amount of wealth which comes to a person during a stated period of time."

These definitions of "income" contemplate a measurable gain to the individual. Compensation for personal injuries, however, functions to restore the recipient to the status she or he enjoyed prior to injury:

> It is a recognized and established principle of the law of torts, founded in sound reason, that the compensation awarded to one who is injured, either in person or property, by the wrongful act of another, shall at least be equal to, and should in all cases be commensurate with, the loss or injury sustained.

22 Am. Jur.2d, Damages § 85 note 3 (Citations omitted). Since such payments are considered to make the individual whole again, the element of measurable gain is lacking.

By way of analogy, the pronouncements of the Supreme Court of the United States on the meaning of "income" in the context of the Internal Revenue Code are also instructive here. In 1919 the Court reiterated what it believed was "income:"

> Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets....

Eisner v. Macomber, 252 U.S. 189 at 207, quoting Stratton's Independence v. Howbert, 231 U.S. 399, 415, and Doyle v. Mitchell Bros. Co., 247 U.S. 179, 185. Later, the Court clarified the basis for this definition: "this court has consistently refused to enter into the refinements of lexicographers or economists and has approved . . . what it believed to be the

commonly understood meaning of the term ["income"] which must have been in the minds of the people when they adopted the Sixteenth Amendment to the Constitution. Merchant's Loan and Trust Company v. Smietanka, 255 U.S. 509, 519 (1921); accord, U.S. v. Stewart, 311 U.S 60, 63 (1940). Finally, when determining that punitive damages must be included as "gross income" for tax purposes the Court held:

> [t]he long history of departmental rulings holding personal injury recoveries nontaxable on the theory that they roughly correspond to a return of capital cannot support exemption of punitive damages following injury to property. Damages for personal injury are by definition compensatory only. Punitive damages, on the other hand, cannot be considered a restoration of capital for taxation purposes.

Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 432 n. 8 (1954). The Internal Revenue Code also excludes from gross income compensation for personal injuries or sickness. 26 U.S.C. § 104.[15]

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15. Defendants cite the case of Betson v. Cohen, 578 F. Supp. 154 (E.D. La. 1983) for the proposition that since personal injury awards are not expressly excluded from application of the statute or the regulation they must be considered as a lump sum. For the reasons stated, the court cannot agree with the conclusions of the court in Betson. The court held that the Internal Revenue Code s exclusion of personal injury awards from gross income did not support the

In light of the aforementioned treatment of personal injury awards, the court concludes that the settled meaning of "income" as expressed by the Supreme Court and as understood in common usage has not been altered by the AFDC statute. Congress has given the court no reason to apply a more particularized meaning of the word in the AFDC context.[16] The court is of the opinion, therefore, that it is

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claim that those awards are not income for purposes of the AFDC statute. Id. at 159. The court stated:

> That exclusion . . . is expressly established by statute at 26 U.S.C. § 104(a)(2). Were such a provision not made, such awards could be considered income under the Internal Revenue Code general provision of income, 26 U.S.C. § 61(a). See Roemer v. Commissioner of Internal Revenue, 716 F.2d 693, 696, n. 2 (9th Cir 1983).("Since there is no tax basis in a person s health and other personal interests, money received as compensation for an injury to those interests might be considered a realized accession to wealth" absent the exclusion.) The plaintiffs' argument fails in light of these considerations.

578 F. Supp. at 159. (Emphasis supplied.) The court' finds this reasoning unpersuasive in light of the Supreme Court's pronouncement in Glenshaw Glass, supra. Furthermore, the Betson court's reliance on the statutory exclusion of personal injury awards ignores the definition of "income" established by common usage.

16. Except to the extent to which the court has discussed governmental provisions dealing with "income" and personal injury awards, the court finds it unnecessary to consider plaintiffs' remaining contention regarding administrative

irrational to treat a damaged car or home more favorably than a damaged body. Consequently, the defendants' interpretation of the lump sum rule as inclusive of personal injury awards is unreasonable and, as applied to such awards, cannot stand. Summary Judgment is hereby granted for plaintiffs on their second claim for relief. The case shall be set by petition of the parties for further proceedings to determine the appropriate relief to be granted.

An appropriate order shall be entered accordingly.

Dated: This 26th day of July, 1984.

(Signed: James C. Turk)
Chief United States District
Judge

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characterizations of compensation for personal injuries.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ONA MAE REED, ET AL.,	)	CIVIL ACTION
	)	NO. 83-0493
PLAINTIFFS,	)	
	)	ORDER
v.	)	
	)	By: James C. Turk
WILLIAM LUKHARD, ET AL.,	)	Chief U. S. District Judge
	)	
DEFENDANTS.	)	

In accordance with the Memorandum Opinion filed this day, it is

ADJUDGED and ORDERED

that Plaintiffs' Motion for Summary Judgment be, and hereby is, Granted on the issue of the definition of "income" for purposes of the AFDC statute. Defendants' Motion for Summary Judgment is hereby Denied.

The parties are Ordered to contact the court to set a hearing on the appropriate relief to be granted.

ENTER: This 26th of July, 1984.

(Signed: James C. Turk)
Chief United States District Judge

Final Judgment and Order dated October 3, 1984

Following a hearing held September 25, 1984, on the issue of relief, it is hereby

ADJUDGED AND ORDERED

as follows:

1. The Secretary of Health and Human Services (the federal defendant) is dismissed as a party defendant with the understanding that the federal defendant will take no action which would interfere with the state defendant's compliance with this order.

2. Defendant Lukhard's (state defendant) Motion for Reconsideration is DENIED.

3. Defendant Lukhard, his agents, employees, successors, assigns, and all other persons acting in concert and participation with him, are hereby enjoined from counting lump-sum compensation derived from personal injuries as income, rather than as a resource, and are hereby enjoined from denying, reducing, or terminating ADC benefits to the members of the Plaintiff class by application of the "lump-sum" policies set out at 45 C.F.R. § 233.20(a)(3)(ii)(D) and ADC MANUAL § 305.4c.

4. Defendant Lukhard, his agents, employees, successors, or assigns, will cause current ADC benefits to be paid to the named plaintiffs in this action.

5. Defendant Lukhard, his agents, employees, successors, or assigns, will cause current ADC benefits to be paid to those class members who should presently be receiving said benefits but for the lump sum policies regarding personal injury awards as set out at 45 C.F.R. § 233.20(a)(3)(ii)(D) and ADC MANUAL § 305.4c.

6. Defendant Lukhard will cause individual notice to be sent by mailing to the last known address of those persons listed on the computer "snapshots" (one such "snapshot" taken in July, 1983, and one to be taken within fifteen (15) days of the entry of this order) whose benefits were denied or terminated due to personal injury awards. Said notice shall be approved by the court prior to mailing.

7. Defendant Lukhard will cause notice of this decision to be published once a week for four (4) weeks in no fewer than four (4) regional newspapers in Virginia, one of which must be the Richmond newspaper.

8. Defendant Lukhard will cause notice of this decision to be posted in each local office of the Virginia Department of Social Services and of the Virginia Department of Health. Said notice shall remain posted for a period of at least sixty (60) days.

9. Plaintiff's request for retroactive benefits under 42 U.S.C. § 602(a)(22) is DENIED. See Pennhurst State School and Hospital v. Halderman, __ U.S. __, 104 S.Ct. 900 (1984) and Buckhanon v. Percy, 708 F.2d 1209 (7th Cir. 1983).

10. Execution of items 3, 5, 6, 7, and 8 of this order shall be stayed pending any appeal in this matter. See Fed. R. Civ. P. 62.

11. As the defendant is a state agency, no bond will be required for the appeal.

The Clerk of Court is directed to strike this case from this court's active docket and to send certified copies of this final order to all counsel of record.

ENTER: This 3rd day of October, 1984.

(Signed) James C. Turk
Chief U.S. District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-2167

Ona Mae Reed, et al,

Appellees,

versus

Health and Human Services,

Appellant,

and

William L. Lukhard, etc.,

Defendant.

No. 84-2168

Ona Mae Reed, et al,

Appellees,

versus

Health and Human Services,

Defendant,

and

William L. Lukhard, etc.,

Appellant.

No. 84-2187

Ona Mae Reed, et al,

Appellants,

versus

Department of Health and
Human Services, et al,

Appellees.

Appeals from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge

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The appellant/cross appellee's, Lukhard, petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Widener and Judge Ward, United States District Judge, sitting by designation.

For the Court,

(Signed) John M. Greacen
CLERK

Filed November 14, 1985. U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2167(L)

Ona Mae Reed, Sallie Long, Ruth Wilcher, Opal Mae Cook, Stella King, and all others similarly situated,

Appellees,

versus

Health and Human Services,

Appellant,

and

William L. Lukhard, Commissioner of the Va. Dept. of Welfare,

Defendant.

No. 84-2168

Ona Mae Reed, Sallie Long, Ruth Wilcher, Opal Mae Cook, Stella King, and all others similarly situated,

Appellees,

versus

Health and Human Services,

Defendant,

and

William L. Lukhard, Commissioner of the Va. Dept. of Welfare,

Appellant.

No. 84-2187

Ona Mae Reed, Sallie Long, Ruth Wilcher, Opal Mae Cook, Stella King, and all others similarly situated,

Appellants,

versus

Department of Health and Human Services; William L. Lukhard, Commissioner of the Va. Dept. of Welfare,

Appellees.

Appeals from the United States District Court for the Western District of Virginia at Roanoke. James C. Turk, U.S. District Judge.

Upon consideration of the appellant/cross appellees', William L. Lukhard, motion to stay the mandate pending application to the United States Supreme Court for a writ of certiorari,

IT IS ORDERED that the motion is granted.

Entered at the direction of Judge Phillips with the concurrence of Judge Widener, and Judge Ward, United States

District Judge, sitting by designation.

For the Court,

(Signed) John M. Greacen
CLERK

Filed November 21, 1985, U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-2167(L)

Ona Mae Reed,
Sallie Long,
Ruth Wilcher,
Opal Mae Cook,
Stella King, and
all others similarly
situated,

Appellees,

versus

Health and Human Services,

Appellant,

and

William L. Lukhard, Commissioner
of the Va. Dept. of Welfare,

Defendant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge.

Upon consideration of the appellees' motion to vacate or modify the stay of mandate,

IT IS ORDERED that the motion is denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Widener and Judge Ward, United States District Judge, sitting by designation.

For the Court,

(Signed) John M. Greacen
Clerk

Filed December 13, 1985, U.S. Court of Appeals
Fourth Circuit

APPENDIX D

* * * *

(17) provide that if a person specified in paragraph (8)(A)(i) or (ii) receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member—

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and

(B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A);

* * * *

* * * *

(17) provide that if a child or relative applying for or receiving aid to families with dependent children, or any other person whose need the State considers when determining the income of a family, receives in any month an amount of earned or unearned income which, together will all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member--

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and

(B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A);

except that the State may at its option recalculate the period of ineligibility otherwise determined under subparagraph (A) (but only with respect to the remaining months in such period) in any one or more of the following cases: (i) an event occurs which, had the family been receiving aid under the State plan for the month of the occurrence, would result in a change in the amount of aid payable for such month under the plan, or (ii) the income received has become unavailable to the members of the family for reasons that were beyond the control of such members, or (iii) the family incurs, becomes responsible for, and pays medical expenses (as allowed by the State) in a month of ineligibility determined under

subparagraph (A) (which expenses may be considered as an offset against the amount of income received in the first month of such ineligibility);

* * * *

§ 233.10(a)(1) General provisions regarding coverage and eligibility.

(a) State plan requirements. A State plan under title I, IV-A, X, XIV, or XVI, of the Social Security Act must:

(1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. Under this requirement:

(i) A State shall impose each condition of eligibility required by the Social Security Act; and

(ii) A State may:

(A) Provide more limited public assistance coverage than that provided by the Act only where the Social Security Act or its legislative history authorizes more limited coverage;

(B) Impose conditions upon applicants for and recipients of public assistance which, if not satisfied, result in the denial or termination of public assistance, if such conditions assist the State in the efficient administration of its public assistance programs, or further an independent State welfare policy, and are not inconsistent with the provisions and purposes of the Social Security Act.

(iii) There must be clarity as to what groups are included in the plan, and which are within, and which are outside, the scope of Federal financial participation.

(iv) Eligibility conditions must be applied on a consistent and equitable basis throughout the State.

(v) A plan under title XVI must have the same eligibility conditions and other requirements for the aged, blind, and disabled, except as otherwise specifically required or permitted by the Act.

(vi) Eligibility conditions or agency procedures or methods must not preclude the opportunity for an individual to apply and obtain a determination of eligibility or ineligibility.

(vii) Methods of determining eligibility must be consistent with the objective of assisting all eligible persons to qualify.

* * * *

(D) Net income, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance. When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring lump sum income, the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility shall begin with the month of receipt of the nonrecurring income or, at State option, as late as the corresponding payment month. For purposes of applying the lump sum provision, family includes the AFDC assistance unit and any other individual whose lump sum income is counted in determining the period of ineligibility. A State may shorten the period of ineligibility where it finds that a life-threatening circumstance. Further, until that time the non-recurring income must have been used to meet essential needs and currently the assistance unit must have no other income or resources sufficient to meet the life-threatening circumstance.

(F) When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income, the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility shall begin with the month of receipt of the nonrecurring income or, at State option, as late as the corresponding payment month. For purposes of applying the lump sum provision, family includes all persons whose needs are taken into account in determining eligibility and the amount of the assistance payment. A State may shorten the remaining period of ineligibility when: the standard of need increases and the amount the family would have received also changes; the lump sum income or a portion thereof becomes unavailable to the family for a reason beyond the control of the family; or the family incurs and pays for medical expenses. If the State chooses to shorten the period of ineligibility, the State plan shall:

(1) Identify which of the above situations are included;

(2) In the case of situations involving the increase in the need standard and changes in the amount that have been paid to the family, specify the types of circumstances which will be included;

(3) In the case of situations involving the unavailability of the lump sum income, include a definition of unavailability, and specify what reasons will be considered beyond the control of the family;

(4) In the case of situations involving the payment of medical expenses, specify the types of medical expenses the State will allow to be offset against the lump sum income.

* * * *

C. Lump Sum Payments - The receipt or expected receipt (during the prospective cycle) of a nonrecurring lump sum payment such as the accumulation of benefits for a prior period, earned income tax credit refund, an insurance settlement, loans for current living expenses or from any other unearned source, must be prorated and reflected as income when the lump sum plus all other net countable income exceeds the standard of need (100 percent) in the month of receipt.

Monies received from THE SALE OR CONVERSION OF ANY REAL OR PERSONAL PROPERTY are not considered a lump sum. (See Section 303.3)

In situations where a child receives a lump sum, the option to exclude the child and the income is prohibited. Lump sum payments received by any member of the assistance unit must be used to establish continued eligibility or ineligibility of the unit.

A caretaker-relative other than the parent or an EWB other than the parent is not eligible for inclusion in the assistance unit if he receives a lump

SUM WHICH WHEN ADDED TO OTHER INCOME OF THE ASSISTANCE UNIT WOULD CAUSE INELIGIBILITY BASED ON THE 90 PERCENT STANDARD OF ASSISTANCE. THE CARETAKER-RELATIVE OR EWB OTHER THAN THE PARENT SHALL HAVE A PERIOD OF INELIGIBILITY ESTABLISHED FOR THAT INDIVIDUAL ONLY USING 100 PERCENT OF NEED FOR AN ASSISTANCE UNIT OF ONE.

THE FOLLOWING PROCEDURES ARE APPLICABLE IN THE TREATMENT OF LUMP SUMS:

1. DETERMINING AMOUNT OF LUMP SUM TO BE CONSIDERED - ONLY THE AMOUNT RECEIVED BY AN INDIVIDUAL WHICH IS AVAIL-

ABLE FOR MAINTENANCE SHALL BE CONSIDERED AS INCOME.

IN THE CASE OF EIC REFUNDS, THE AMOUNT USED IN THE RECONCILIATION PROCESS WILL BE DEDUCTED PRIOR TO CONSIDERING THE REFUND AS INCOME.

IN OTHER SITUATIONS, if a client has established that there are directly related expenses associated with the lump sum, which were incurred prior to or within 30 days after receipt of the lump sum, then only that portion of the lump sum less the directly related expenses(s) will be considered as income.

Prior to allowing the directly related expenses(s), documented evidence of the existence of this expense must be obtained. Directly related expenses are items such as funeral expenses, medical bills, legal fees, or liens against insured property. Expenses, incurred pending receipt of a lump sum, for day-to-day living are not considered directly related expenses.

Lump sum payments received as a result of an accumulation of benefits for a prior period, such as Social Security benefits, will have no directly related expense deductions.

Example #1: Ms. S. notifies an agency that she has received a disability settlement, due to an accident, of $2,000; however, she has medical expenses associated with the accident of $500 and attorney fees, related to the settlement, of $500. Prior to allowing the deduction of $1,000 from the lump sum, the agency must have verification that the medical expense and

attorney fees were incurred or verification of the actual payment.

Example #2: Ms. J. notifies the agency that she is the beneficiary for her uncle's life insurance and has received $2,000 as a result of his death. She also provides the agency with verification that she owes the funeral home $1,000 towards determining the period of ineligibility.

If the case continues to be eligible after deducting incurred expenses, the client must provide verification of payment of those expenses promptly in order for the agency to impact the proper payment month.

In those instances where verification of payment is not provided promptly, the lump sum payment will be counted in full. Any payment made on incurred expenses after the lump sum has been reflected in the grant will not be deducted.

The agency must advise the applicant/recipient of the requirements for making actual payments and the consequences for failure to do so.

2. How to count lump sum - add the lump sum or the remainder of the lump sum after expenses to other NET countable income received in the same month to arrive at total income for the budget month. Lump sum income received during the retrospective cycle will always be reflected in the corresponding payment month.

   a. If total income including the lump sum is less than 100% of need for the budget month, reflect all income in the corresponding payment month by either re-

ducing the payment or suspending the grant for one month, whichever is appropriate. If total income falls between 90 percent and 100 percent, the excess will not be counted in the following month.

Example

A.U. of 3 in Group II receives a $250 lump sum in July. The A.U. has other income of $25. Total income for July ($275) is less than the standard of need at 100% ($283); therefore, reflect total income in September by suspending the case. Reinstate for October counting only the $25 income that the A.U. already had.

b. If total income including the lump sum equals or exceeds 100% of need, a period of ineligibility must be established.

1) Divide total budget month income (net countable income plus the lump sum minus appropriate directly related expenses) by the 100% standard of need for the assistance unit to determine the number of months that the assistance unit will be ineligible. Any income remaining after this calculation is counted as income in the first month following the period of ineligibility.

2) Begin the period of ineligibility in the corresponding payment month except when the lump sum was not reported timely. If not reported timely (in time to effect the proper payment month) the period of ineligibility will begin in the month of receipt.

The total amount of a lump sum received by a parent or stepparent in the home who is not in the assistance unit must be considered. If the amount of the lump sum when added to other countable income of the assistance unit would cause the assistance unit to be ineligible the relative who received the lump sum will be considered a member of the assistance unit for purposes of determining the period of ineligibility.

3. The Period of Ineligibility - Once established the period of ineligibility may not be shortened due to changes in the client's situation. All members of the assistance unit, including the parent or stepparent who received a lump sum and as a result was considered a part of the assistance unit, will be ineligible for the duration of the period of ineligibility.

   Exception: The period of ineligibility may be shortened when the lump sum monies have been or will be expended in connection with a life-threatening circumstance. Prior to shortening the period of ineligibility the EW must establish that (1) the life threatening circumstance occurred after receipt of the lump sum, (2) all lump sum monies spent prior to the occurrence of the life threatening circumstances were used to meet maintenance needs as specified in 304.1, and (3) the assistance unit currently has no other income or resources sufficient to meet the life threatening circumstance. The case record must be well documented in this area. A life threatening circumstance is defined as a situation which is the direct result of a natural disaster or fire.

4. Application/reapplications when a lump sum has been received - The eligibility worker must evaluate prior receipt of a lump sum when making an eligibility determination of any application. The following rules are applicable when

evaluating a lump sum prior to a decision of eligibility.

a. Any person whose needs were considered in establishing a period of ineligibility will not be eligible for assistance until the period of ineligibility has ended. (305.4.C.2. & 3.) Persons not considered in establishing the period of ineligibility may be eligible provided all other eligibility factors are met.

b. In situations where the recipient did not provide verification of payment or directly related expenses and the full amount of the lump sum was used to establish a period of ineligibility, subsequent provision of verification of payment will not change the established period of ineligibility.

c. A lump sum received prior to the month of application shall be evaluated in accordance with the resource policy.

d. A LUMP SUM RECEIVED DURING THE MONTH OF APPLICATION OR AT ANY TIME DURING PENDING STATUS OF THE APPLICATION SHALL BE TREATED AS INCOME IN THE MONTH RECEIVED AND, IF APPROPRIATE, A PERIOD OF INELIGIBILITY SHALL BE ESTABLISHED USING THE PROCEDURE IN 2.b.1. ABOVE. IN THIS SITUATION THE PERIOD OF INELIGIBILITY SHALL BEGIN WITH THE MONTH OF RECEIPT OF THE LUMP SUM.

e. Cases which are closed for failure to secure verification of lump sum payments must provide verification and have a period of ineligibility established (if

necessary) prior to any future receipt of assistance. The period of ineligibility, even though established at a later time, shall begin with the month of receipt of the lump sum.

B. Income From Social Security and Other Benefits - The total monthly amount actually received by members of the assistance unit from such benefits is the amount to be counted as income on a monthly basis, with the following exceptions:

1. When a member of the assistance unit is eligible for benefits, (such as but not limited to, RR Retirement, private corporation retirement, Veterans, Social Security, or any reduced benefits), the verified amount must be counted, even though the individual chooses not to accept such benefits.

If the individual refuses to apply for benefits and the amount to which he is entitled cannot be verified, it is not possible to determine that the individual is in need and he cannot be included in the assistance unit.

2. When educational benefits are being received from Veterans Administration. (See 305.4A. 14.)

3. When the Medicare (Part B) premium is deducted monthly from the Social Security or railroad retirement benefit, the amount of benefits actually received, plus the amount of the Part B premium is to be counted as income.

C. Lump Sum Payments - The receipt or expected receipt (during the prospective cycle) of a nonrecurring lump sum payment such as the accumulation of benefits for a prior period, earned income tax credit refund, an insurance settlement, loans for current living expenses, REFUNDS OF OVERCOLLECTED CHILD SUPPORT IDENTIFIED AS SUPPORT PAYMENTS PAID IN EXCESS OF PUBLIC ASSISTANCE or INCOME from any other unearned source, must be prorated and reflected as income when the lump sum plus all other net count-

able income exceeds the standard of need (100%) in the month of receipt.

Monies received from the sale or conversion of any real or personal property are not considered a lump sum. (See Section 303.3)

In situations where a child receives a lump sum, the option to exclude the child and the income is prohibited. When the worker learns that a child in an assistance unit expects to receive a lump sum, the worker shall advise the caretaker/relative of the right to exclude the child from the assistance unit. Lump sum payments received by any member of the assistance unit must be used to establish continued eligibility or ineligibility of the unit.

A caretaker-relative or EWB, other than the parent or stepparent, is not eligibile for inclusion in the assistance unit if he receives a lump sum which when added to other income of the assistance unit would cause ineligibility based on the 90 percent standard of assistance. The caretaker-relative or EWB, other than the parent or stepparent, shall have a period of ineligibility established for that individual by using the lump sum plus that individual's net countable income divided by 100% of need for an assistance unit of one.

The following procedures are applicable in the treatment of lump sums:

1. Determining amount of lump sum to be considered - only the amount received by an individual which is available for maintenance (lump sum, less directly related expenses paid) shall be considered as income.

   In the case of EIC refunds, the amount used in the reconciliation process will be deducted prior to considering the refund as income. See 305.3 F.3 FOR TREATMENT OF EIC REFUNDS.

In other situations, if a client has established that there are directly related expenses associated with the lump sum, which were incurred prior to or within 30 days after receipt of the lump sum, then only that portion of the lump sum less the directly related expenses(s) will be considered as income.

Prior to allowing the directly related expenses(s), documented evidence of the existence of this expense must be obtained. Directly related expenses are items such as funeral expenses, medical bills, legal fees, or liens against insured property. Expenses, incurred pending receipt of a lump sum, for day-to-day living are not considered directly related expenses.

Lump sum payments received as a result of an accumulation of benefits for a prior period, such as Social Security benefits, will have no directly related expense deductions.

Example #1: Ms. S. notifies an agency that she has received a disability settlement, due to an accident, of $2,000; however, she has medical expenses associated with the accident of $500 and attorney fees, related to the settlement, of $500. Prior to allowing the deduction of $1,000 from the lump sum, the agency must have verification that the medical expense and attorney fees were incurred or verification of the actual payment.

Example #2: Ms. J. notifies the agency that she is the beneficiary for her uncle's life insurance and has received $2,000 as a result of

his death. She also provides the agency with verification that she owes the funeral home $1,000. The agency will only consider $1,000 towards determining the period of ineligibility.

If the case continues to be eligible after deducting incurred expenses, the client must provide verification of payment of those expenses promptly in order for the agency to impact the proper payment month.

In those instances where verification of payment is not provided promptly, the lump sum payment will be counted in full. Any payment made on incurred expenses after the lump sum has been reflected in the grant will not be deducted.

The agency must advise the applicant/recipient of the requirements for making actual payments and the consequences for failure to do so.

2. How to count lump sum - add the lump sum or the remainder of the lump sum after expenses to other net countable income received in the same month to arrive at total income for the budget month. Lump sum income received during the retrospective cycle will be reflected in the corresponding payment month except when the case is being closed for other reasons. When a lump sum is received in the month of case closure, the period of ineligibility will begin the month following the month of receipt of the lump sum. The recipient must be advised of the duration of the period of ineligibility.

a. If total income including the lump sum is less than 100% of need for the budget month, reflect all income in the corresponding payment month by either reducing the payment or suspending the grant for one month, whichever is appropriate. If total income falls between 90 percent and 100 percent, the excess will not be counted in the following month.

Example

A. U. of 3 in Group II receives a $275 lump sum in July. The A.U. has other income of $25. Total income for July ($300) is less than the standard of need at 100% ($322); therefore, reflect total income in September by suspending the case. Reinstate for October counting only the $25 income that the A.U. already had.

b. If total income including the lump sum equals or exceeds 100% of need, a period of ineligibility must be established.

(1) Divide total budget month income (net countable income plus the lump sum minus appropriate directly related expenses) by the 100% standard of need for the assistance unit to determine the number of months that the assistance unit will be ineligible. Any income remaining after this calculation is counted as income in the first month following the period of ineligibility.

(2) Begin the period of ineligibility in the corresponding payment month except when the lump sum was not reported timely. If not reported

timely (in time to effect the proper payment month) the period of ineligibility will begin in the month of receipt.

The total amount of a lump sum, less directly related expenses paid, received by a parent in the home who is not in the assistance unit must be counted. If the amount of the lump sum when added to other countable income of the assistance unit would cause the assistance unit to be ineligible, the parent who received the lump sum will be considered a member of the assistance unit for purposes of determining the period of ineligibility ONLY.

A lump sum received by a stepparent not included in the assistance unit will be considered income available to the assistance unit in the month of receipt only (see 305.4.F.). Subsequent to the payment month in which the income is reflected, the remainder of the lump sum will be a resource to the stepparent and is not to be considered in determining eligibility for the assistance unit.*

A lump sum received by a stepparent included in the assistance unit will be considered in accordance with 305.4C.

3. The Period of Ineligibility - Once established, the period of ineligibility may not be shortened due to changes in the client's situation EXCEPT IN SITUATIONS CITED BELOW.** All members of the assistance unit, including the parent who received a lump sum and as a result was considered a part of the assistance unit, will be ineligible for the duration of the period of ineligibility.

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*45 CFR 233.20(a)(3)(xiv)

**45 CFR 233.20(a)(3)(ii)(F)

Exception: WHEN ANY ONE OR MORE OF THE FOLLOWING SITUATIONS HAS OCCURRED, THE PERIOD OF INELIGIBILITY MUST BE RECALCULATED. IF THE RECALCULATED INELIGIBILITY PERIOD IS SHORTER THAN THE ONE PREVIOUSLY ESTABLISHED, THE PERIOD OF INELIGIBILITY MUST BE ADJUSTED.

a. THE STANDARD OF NEED HAS BEEN INCREASED SINCE THE PERIOD OF INELIGIBILITY WAS ESTABLISHED (MOVING FROM ONE LOCALITY GROUPING TO ANOTHER DOES NOT MEET THIS CONDITION),

b. THE ASSISTANCE UNIT INCURS MEDICAL EXPENSES SUBSEQUENT TO RECEIPT OF THE LUMP SUM, AND THE LUMP SUM MONIES ARE USED TO PAY THESE EXPENSES,

c. THE LUMP SUM, OR A PORTION THEREOF, BECOMES UNAVAILABLE DUE TO ONE OF THE FOLLOWING CIRCUMSTANCES:

1) A MEMBER OF THE ASSISTANCE UNIT, OR A RELATIVE OF SPECIFIED DEGREE LIVING WITH THE ASSISTANCE UNIT, ABSCONDS WITH THE LUMP SUM MONIES,

2) THE LUMP SUM MONIES ARE STOLEN AND THE THEFT IS REPORTED TO POLICE,

3) PAYMENT OF DEBTS WHICH ARE INCURRED FOR A MEMBER OF THE ASSISTANCE UNIT. DEBTS ARE DEFINED AS MEDICAL BILLS INCURRED FROM THE PERIOD

PRIOR TO RECEIPT OF THE LUMP SUM, EXPENSES RELATED TO A NATURAL DISASTER OR FIRE, COSTS RELATED TO AVOIDING THE ASSISTANCE UNIT'S EVICTION AND/OR A UTILITY CUT-OFF, WEATHER RELATED REPAIRS OR REPLACEMENT TO THE HOME IN WHICH THE ASSISTANCE UNIT LIVES, AND FUNERAL EXPENSES,

4) OR ANY OTHER CONDITION WHICH, IN THE BEST JUDGMENT OF THE LOCAL AGENCY, IS DEEMED TO HAVE OCCURRED BEYOND THE CONTROL OF THE PARENT(S) AND/OR ASSISTANCE UNIT. FINAL AUTHORITY FOR SUCH DECISIONS WILL REST WITH EACH LOCALITY.

MEDICAL SERVICES WHICH WILL BE ALLOWED UNDER ITEMS b. AND c.3 WILL BE THE FOLLOWING: INPATIENT HOSPITAL SERVICES; OUTPATIENT HOSPITAL SERVICES; LABORATORY AND X-RAY SERVICES; NURSING HOME CARE; HOME HEALTH SERVICES; CLINIC SERVICES; PHARMACEUTICAL SERVICES; OPTOMETRY SERVICES; MEDICAL SUPPLIES AND EQUIPMENT; FAMILY PLANNING SERVICE; ACUPUNCTURE; TRANSPORTATION NECESSARY FOR MEDICAL CARE; SCREENING SERVICES; PHYSICAL, OCCUPATIONAL, AND SPEECH THERAPY; AND PHYSICIAN'S SERVICES, INCLUDING SERVICES PROVIDED BY ANY PERSON LICENSED TO PRACTICE MEDICINE, OSTEOPATHY, CLINICAL PSYCHOLOGY, CHIROPRACTIC, PODIATRY, OR MIDWIFERY.

THE CASE RECORD MUST BE FULLY DOCUMENTED. ACCEPTABLE SUBSTANTIATION INCLUDES POLICE RECORDS OR POLICE STATEMENTS INDICATING THE AMOUNT STOLEN IN THEFT SITUATIONS, RECEIPTS SHOWING THE TYPE OF DEBTS AND THE AMOUNT PAID, RECEIPTS SHOWING MEDICAL SERVICES PROVIDED AND THE AMOUNT PAID, AND FOR AGENCY JUDGMENT SITUATIONS, WHATEVER SUBSTANTIATION THE AGENCY DEEMS APPROPRIATE.

WHEN A FAMILY MEMBER ABSCONDS WITH THE LUMP SUM MONIES, A NOTARIZED STATEMENT FROM THE APPLICANT/RECIPIENT IS SUFFICIENT. THE NOTARIZED STATEMENT MUST SPECIFY THE AMOUNT TAKEN.

THE PERIOD OF INELIGIBILITY CAN ONLY BE SHORTENED UPON A REAPPLICATION DURING THE INELGIBILITY PERIOD, UNLESS THE CLIENT MEETS THE PROVISIONS FOR SHORTENING THE PERIOD PRIOR TO CASE CLOSURE, IN WHICH CASE A RECALCULATION, IF APPROPRIATE, WILL BE MADE. ANY CHANGES, SUBSEQUENT TO THE ESTABLISHMENT OF THE PERIOD OF INELIGIBILITY, CATEGORICAL OR FINANCIAL, WILL NOT BE CONSIDERED IN THE RECALCULATION.

THE FOLLOWING ARE EXAMPLES OF HOW TO SHORTEN/RECALCULATE THE PERIOD OF INELIGIBILITY:

EXAMPLE I - INCREASE IN STANDARDS

MISS A. RECEIVES A $3,000 LUMP SUM IN FEBRUARY.

INITIAL PERIOD OF INELIGIBILITY CALCULATION
$3,000 ÷ $298 (100% NEED STANDARD, GROUP II, A.U. OF 3, AT THE TIME THE CASE WAS CLOSED) = 10 MONTHS WITH $20 TO COUNT IN 11TH MONTH.
PERIOD OF INELIGIBILITY - APRIL - JANUARY WITH $20 TO COUNT IN FEBRUARY

STANDARDS INCREASE IN JULY

ADJUSTED PERIOD OF INELIGIBILITY
$3,000 ÷ $322 (NEW 100% NEED STANDARD) = 9 MONTHS WITH $102 TO COUNT IN 10TH MONTH.
PERIOD OF INELIGIBILITY - APRIL - DECEMBER WITH $102 TO COUNT IN JANUARY.

EXAMPLE II - SHORTENING THE PERIOD OF INELIGIBILITY FOR SITUATIONS OTHER THAN AN INCREASE IN STANDARDS.

MRS. B. RECEIVES A LUMP SUM OF $950 IN MARCH.

INITIAL PERIOD OF INELIGIBILITY CALCULATION
$950 ÷ $257 (A.U. OF 2, 100% OF NEED, GROUP II) = 3 MONTHS WITH $179 TO COUNT IN FOURTH MONTH
PERIOD OF INELIGIBILITY - MAY - JULY WITH $179 TO COUNT IN AUGUST

RECALCULATION OF PERIOD OF INELIGIBILITY
$950 - $600 (MEDICAL BILLS PAID) = $350 REDUCED LUMP SUM
$350 ÷ $257 = 1 MONTH OF INELIGIBILITY

WITH $93 TO COUNT IN SECOND MONTH

ADJUSTED PERIOD OF INELIGIBILITY

MAY AND $93 TO COUNT IN JUNE

4. Applications/reapplications when a lump sum has been received - the eligibility worker must evaluate prior receipt of a lump sum when making an eligibility determination of any application. The following rules are applicable when evaluating a lump sum prior to a decision of eligibility.

   a. Any person whose needs were considered in establishing a period of ineligibility will not be eligible for assistance until the period of ineligibility has ended. (305.4.C.2. & 3.) Persons not considered in establishing the period of ineligibility may be eligible provided all other eligibility factors are met.

   b. In situations where the recipient did not provide verification of payment or directly related expenses and the full amount of the lump sum was used to establish a period of ineligibility, subsequent provision of verification of payment will not change the established period of ineligibility.

   c. A lump sum received prior to the month of application shall be evaluated in accordance with the resource policy.

   d. A lump sum received during the month of application or at any time during pending status of the application shall be treated as income in the month received and, if appropriate, a period of ineligibility shall

be established using the procedure in 2.b.1. above. In this situation the period of ineligibility shall begin with the month of receipt of the lump sum.

e. Cases which are closed for failure to secure verification of lump sum payments must provide verification of the payments prior to any future receipt of assistance. The period of ineligibility, even though established at a later time, shall begin with the month of receipt of the lump sum.

f. Cases which are closed for reasons other than a lump sum, and the lump sum was reported prior to the effective date of case closure, the period of ineligibility will begin in the month following the month in which the lump sum was received. (Refer to 305.4.C.2.) If, however, the lump sum was not reported prior to the effective date of case closure, the period of ineligibility shall be established prior to any future receipt of assistance. The period of ineligibility, in this instance, shall begin with the month of receipt of the lump sum.

THE SECRETARY OF HEALTH AND HUMAN SERVICES
Washington, D.C. 20201

May 5, 1981

The Honorable Thomas P. O'Neill
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

Enclosed for the consideration of the Congress is a draft bill "to amend the Social Security Act to increase the effectiveness and improve the administration of certain programs under the Act, and for other purposes." When enacted, the bill may be cited as the "Social Welfare Amendments of 1981." A section-by-section summary of the bill is also enclosed for your convenience.

The bill would make important improvements to the programs of Aid to Families with Dependent Children (AFDC), Child Support Enforcement (CSE), and Supplemental Security Income (SSI), all of which are established under the Social Security Act. In AFDC, these amendments would conserve Federal resources by assuring that State programs concentrate their efforts on families most in need, encourage work, structure State programs as a temporary safety-net rather than a way of life for the indefinite future, emphasize individual responsibility, and improve program administration in order to increase the accuracy of payments and deter fraud and avoid waste and abuse. To achieve this, the bill contains amendments revising the earned income disregards, setting an overall ceiling on the income of an eligible family, authorizing new community work experience programs for individuals who cannot find regular employment, and requiring a monthly retrospective accounting system and monthly reports from

AFDC recipients. These are only a few of the most crucial improvements; the bill's provisions are all described in detail in the enclosed summary.

In the child support program, also, there is room for significant improvement. Our proposed amendments to the CSE program will facilitate an offset mechanism for collecting delinquent support payments from Federal income tax refunds, broaden authority for the State agency to collect existing support obligations for the child's parent as well as for the child, and improve the system of assessing fees for services on behalf of non-AFDC families and allocating costs between the Federal and State levels of government.

Finally, in the SSI the bill would repeal the mandatory pass through of cost-of-living increases prospectively; this repeal would leave to States the decision of whether to use State resources, for which there are competing demands, to pass through their State supplements some or all of the Federal cost-of-living increases. We would use a monthly retrospective accounting system to determine benefits that parallels the one proposed for AFDC. (In the SSI program, the accounting is on a quarterly prospective basis, which exacerbates the weaknesses of a prospective determination.) Also, the bill would remove the authority to fund State rehabilitation services for SSI recipients from this program; all Federal payments for State rehabilitation services, would, in the future, be provided through a block grant for social services, proposed by this Department separately.

This draft bill implements significant portions of the President's budget for fiscal year 1982, as well as strengthening the ability of the State and Federal governments to achieve the fundamental purposes of these programs. In fiscal year 1982, the changes included in this bill would save over $1 billion in Federal expenditures, with greater savings in future years. State and local costs would also be significantly reduced. We urge that the Congress give the bill its prompt and favorable consideration.

We are advised by the Office of Management and Budget that enactment of this draft bill would be in accord with the program of the President.

Sincerely,

/s/ Dick Schweiker

Secretary

Enclosures

SECTION BY SECTION SUMMARY
SOCIAL WELFARE AMENDMENTS OF 1981

TITLE I -- AMENDMENTS TO THE PROGRAM OF AID TO FAMILIES WITH DEPENDENT CHILDREN

* * * *

Treatment of Income in Excess of the Standard of Need

Section 104 of the draft bill adds a new play requirement specifying the manner in which States must treat significant amounts of income received in a single month. Under current law, there is no way to assure that large payments, such as lump-sum payments of insurance proceeds, or retroactive benefit payments, are considered available to meet current needs over a period of time, even though the family eligibility can be curtailed for the month of receipt. The proposal would specify that these large payments, together with other income remaining after application of the disregards, would be considered as income in the month of receipt and that the family would be ineligible for the number of months obtained by dividing all that month's countable income by the applicable standard. That number (i.e., the number of "standards" met by the income) will define the number of months for which the family will be ineligible for aid. If any amount (a part of the standard) is remaining, that will be counted as income in the first month following the period of ineligibility.

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EDITOR'S NOTE

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ORIGINAL

No. 85-1358 (12)

Supreme Court, U.S.
FILED
MAR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM L. LUKHARD, Commissioner of the Virginia Department of Social Services,

Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, AND ALL OTHERS SIMILARLY SITUATED, and

OTIS R. BOWEN, Secretary U.S. Department of Health and Human Services,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

---

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50pp

The Respondents, ONA MAE REED, et. al., ask leave to file their Brief in Opposition to the Petition for Certiorari from the United States Court of Appeals for the Fourth Circuit, without prepayment of costs, and they seek leave to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States.

Leave to proceed in forma pauperis was sought in the United States District Court for the Western District of Virginia by motion filed June 6, 1983, which was granted by order entered June 6, 1983, pursuant to 28 U.S.C. §1915.

Leave to proceed in forma pauperis was automatically granted by the United States Court of Appeals for the Fourth Circuit, pursuant to Rule 24 of the Federal Rules of Appellate Procedure.

The Respondents' Affidavits in Support of their Motion for Leave to Proceed In Forma Pauperis are attached.

ONA MAE REED, et. al.
-By Counsel-

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Attorneys for Respondents

BY : Jill A Hanken

I, Ona Mae Reed, being first duly sworn, depose and say that I am one of the Appellees in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: why the Supreme Court of the United States should not accept a writ of certiorari from the favorable decision of the United States Court of Appeals for the Fourth Circuit.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

(1) Are you presently employed? ____ Yes X No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. ____

1977 or 1978 - $628.00/month

(2) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source:

X Yes ____ No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

Aid to Dependent Children (ADC) - $207.00/month

(3) Do you own any cash or checking or savings account?

____ Yes ___X___ No

(a) If the answer is yes, state the total value of the items owned. ____

(4) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? ___X___ Yes ____ No

(a) If the answer is yes, describe the property and state its approximate value. 1973 Opel automobile - $175.00

(5) List the persons who are dependent upon you for support and state your relationship to those persons.

Billie Christine Reed, daughter

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I declare under penalty of perjury that the foregoing is true and correct.

Executed on Feb. 13, 1986.

Ms. Ona Mae Reed

Ona Mae Reed

Notarization omitted

pursuant to 28 U.S.C. §1746.

I, Sally Long, being first duly sworn, depose and say that I am one of the Appellees in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: why the Supreme Court of the United States should not accept a writ of certiorari from the favorable decision of the United States Court of Appeals for the Fourth Circuit.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

(1) Are you presently employed? ____ Yes ✓ No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. ____

last employed approx. May, 1982, earned approx. $100-120/mo.

(2) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source:

✓ Yes ____ No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

ADC benefits, approx. $245/mo. Jan.-June, 1985, approx $265/mo. July-Dec., 1985;

rental income, $160 (approx - gross 1985);

babysitting, approx $100 1985.

(3) Do you own any cash or checking or savings account?

___ Yes ___✓___ No

(a) If the answer is yes, state the total value of the items owned. ___

(4) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? ___✓___ Yes ___ No

(a) If the answer is yes, describe the property and state its approximate value. Home at 48 Jefferson St, Danville, Va., market value: $15690, equity value: $4940.

(5) List the persons who are dependent upon you for support and state your relationship to those persons.

Dexter Long (son) 17; Melanie Long (daughter) 12.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 18, 1986.

Sallie Long

Sally Long

Notarization omitted

pursuant to 28 U.S.C. §1746.

I, Ruth Wilcher, being first duly sworn, depose and say that I am one of the Appellees in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: why the Supreme Court of the United States should not accept a writ of certiorari from the favorable decision of the United States Court of Appeals for the Fourth Circuit.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

(1) Are you presently employed? ____ Yes X No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Approximately $365.00 per month. 6/6/85 part-time production work 3 - 4 hours a day.

(2) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source:

____ Yes X No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

(3) Do you own any cash or checking or savings account?

____ Yes X No

(a) If the answer is yes, state the total value of the items owned. ____

(4) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? X Yes ____ No

(a) If the answer is yes, describe the property and state its approximate value. 1968 Oldsmobile Cutlass - $100.00

(5) List the persons who are dependent upon you for support and state your relationship to those persons. David - son.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I declare under penalty of perjury that the foregoing is true and correct.

Executed on February ____, 1986.

Ruth Patterson (formerly Wilcher)
Ruth Wilcher

Notarization omitted
pursuant to 28 U.S.C. §1746.

I, Stella King, being first duly sworn, depose and say that I am one of the Appellees in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: why the Supreme Court of the United States should not accept a writ of certiorari from the favorable decision of the United States Court of Appeals for the Fourth Circuit.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

(1) Are you presently employed? X Yes ____ No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. $600/mo. (gross) Gulf, 5026 Charlotte Avenue, Nashville, Tennessee 37209

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. ____

(2) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source:

X Yes ____ No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

Child support: $50/mo. (Court order is for $100 but payor has only been sending $50/mo.)

(3) Do you own any cash or checking or savings account?

__X__ Yes _____ No

(a) If the answer is yes, state the total value of the items owned. ____

Checking account $70 approximately

(4) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? __X__ Yes _____ No

(a) If the answer is yes, describe the property and state its approximate value. 1965 Pontiac. value unknown

(1974 Pontiac SRN-46) Co-ceritancy-from-I listed it upon his title

(5) List the persons who are dependent upon you for support and state your relationship to those persons. ____

one son: Christopher Luckado

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4th, 1986.

Stella A King
Stella King

Notarization omitted
pursuant to 28 U.S.C. §1746.

AFFIDAVIT OF OPAL MAE COOK

I, Opal Mae Cook, being first duly sworn, depose and say that I am one of the Appellees in the above-entitled case; that in support of my motion for leave to proceed in forma pauperis without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: why the Supreme Court of the United States should not accept a writ of certiorari from the favorable decision of the United States Court of Appeals for the Fourth Circuit.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

(1) Are you presently employed? ____ Yes X No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. ____

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. ____

1981 - $461.00/month

(2) Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source:

X Yes ____ No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

Aid to Dependent Children (ADC) - $207.00/month since 7/1/85

Aid to Dependent Children (ADC) - $181.00/month before 7/1/85

(3) Do you own any cash or checking or savings account?

____ Yes X No

(a) If the answer is yes, state the total value of the items owned. ____

(4) Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? ____ Yes X No

(a) If the answer is yes, describe the property and state its approximate value. ____

(5) List the persons who are dependent upon you for support and state your relationship to those persons. ____

Timothy Allen Cook, son

Keith Brian Mabe, son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury. I declare under penalty of perjury that the foregoing is true and correct.

Executed on [illegible] 15, 1986.

Opal Mae Cook

Notarization omitted pursuant to 28 U.S.C. §1746.

No. 85-1358

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM L. LUKHARD, Commissioner of the
Virginia Department of Social Services,

Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER,
OPAL MAE COOK, STELLA KING, AND ALL OTHERS
SIMILARLY SITUATED, and

OTIS R. BOWEN, Secretary
U.S. Department of Health and Human Services,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. DID THE FOURTH CIRCUIT CORRECTLY RULE THAT VIRGINIA'S AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM (AFDC) VIOLATES THE SOCIAL SECURITY ACT BECAUSE IT TREATS PERSONAL INJURY AWARDS AS "INCOME" INSTEAD OF "RESOURCES" AND PENALIZES FAMILIES WHO RECEIVE COMPENSATION FOR BODILY INJURY, YET IMPOSES NO DISQUALIFICATION PENALTY ON THOSE WHO RECEIVE MONEY FROM PROPERTY.

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I. STATEMENT OF THE CASE

In its statement of the case, Petitioner, Virginia Department of Social Services (DSS) ignores the differences between income and resources in the AFDC program; repeatedly misstates that the lump sum income rule adopted by Congress in 1981 applies to all lump sums of money; misrepresents the basis of the opinions of the courts below; and omits any mention of the federal government's post judgment position in this matter. Because of these inaccuracies and omissions, Respondents Ona Mae Reed, et. al., present this statement of the case.

Federal requirements governing the way states count income and resources for AFDC purposes derive from the Social Security Act. 42 U.S.C. §602(a)(7).[1] The Federal statute and regulations have clearly recognized the difference between "income" and "resources", and have provided for some protections to be applied to "resources" that are inapplicable to "income".[2]

In the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L.96-35, 95 Stat. 358, et. seq. (1981), Congress adopted the "lump sum income rule" found in 42 U.S.C. §602(a)(17). (Pet. App. 63) By its clear terms, the statute applies only to receipts of lump sum "income" and not to resources. Likewise, the imple-

****

1 42 U.S.C. §602(a)(7) provides: "[T]he State agency shall, in determining need, take into consideration any...income and resources of any child or relative claiming aid to families with dependent children...."

2 For example, 45 C.F.R. §233.20(a)(3)(i) specifies that a home, an automobile (up to $1,500 in value), and other items are exempt or "exclude[d]" for AFDC purposes. The same regulation permits states to allow recipients to retain up to $1,000 in otherwise non-excluded resources (including cash) without affecting AFDC eligibility. Virginia has opted to set its resource limit at $600. ADC Manual, §303.2(E).

menting federal regulation applies only to receipts of lump sum "income". 45 C.F.R. §233.20(a)(3)(ii)(D). (Pet. App. 68) [Current version at 45 C.F.R. §233.20(a)(3)(ii)(F)(Pet. App. 69)]

Both the federal government and the state of Virginia explicitly acknowledge that not all lump sums of money fall under the lump sum income rule. Specifically, the rule has no application when money represents a resource. Thus, in Virginia's AFDC program, money received upon sale or loss of a car or home or from insurance owned by the family is treated as a resource, and the lump sum income rule does not apply. ADC Manual §§303.3 and 305.4C (Res. App. 2,3, Pet. App. 78).

Despite these principles, Virginia DSS treats money received for personal injuries as lump-sum income and prospectively disqualifies from the program all families who receive personal injury compensation.

Each of the plaintiffs in this case received money for a personal injury suffered by a family member. The named plaintiffs were disqualified from the ADFC program for periods ranging from 2 to 20 months.

Plaintiffs Reed, Long and Wilcher instituted this action on June 6, 1983. They sought injunctive and declaratory relief pursuant to 42 U.S.C. §1983 and 5 U.S.C. §701 et.seq. because of the denial, reduction or termination of their ADC benefits under the lump sum rule. They challenged Virginia's policy of counting personal injury compensation as income subject to the lump sum income rule rather than as a resource, alleging that such policy violated 42 U.S.C. §§602(a)(7),(a)(10), and (a)(17). Later, Respondents Cook and King were allowed to intervene as plaintiffs, and the U.S. Department of Health and Human Services (HHS) was joined as a necessary party.

Upon cross-motions for summary judgment, the district court held that personal injury awards are not income for the purposes of applying the lump sum income rule. Since all parties agreed that the term "income" is nowhere defined in the AFDC statutes or regulations, the district court interpreted the word according to its ordinary and common meaning. In seeking a common usage and definition of the word "income", the district court appropriately viewed dictionary definitions as well as the definitions utilized by other agencies and courts.

Contrary to Petitioner's assertions, the district court did not rely on the definition of income in the federal income tax code to support its conclusion that personal injury awards are not income for AFDC purposes. The district court's review of U.S. Supreme Court opinions dealing with the tax code was "by way of analogy". Reed v. Lukhard, 591 F.Supp. 1247, 1256 (Pet. App. 48). The district court found it "instructive" that the U.S. Supreme Court, when seeking the intent of the creators of the "income" tax system in the Sixteenth Amendment to the Constitution, held that the common meaning of "income" did not include personal injury awards. Id. The district court concluded that Congress intended to limit the application of the lump sum income rule to only those lump sum payments that meet the ordinary meaning of income. 591 F.Supp. at 1257 (Pet. App. 50)

The district court also found fault with Virginia's regulatory scheme because when people receive compensation for property damage, they do not get a fixed period of disqualification; when they receive compensation for a personal injury, they do. The district court utilized a limited "reasonable basis" standard of review to analyze Virginia's regulations. Reed v. Lukhard, 591 F.Supp. at 1255 (Pet. App. 44), and found it is "irrational to

treat a damaged car or home more favorably than a damaged body." 591 F.Supp. at 1257. (Pet. App. 51) The court held that the federal and state interpretation of the lump sum rule as inclusive of personal injury awards is unreasonable and cannot stand. Id.

Both Petitioner and the Secretary of HHS appealed the decision on the ground that personal injury recoveries were properly treated as income for purposes of applying the lump sum income rule. The Fourth Circuit affirmed the decision of the district court in all respects. 774 F.2d 1270, 1272 (Pet. App. 5) With regard to the question of whether personal injury recoveries were income for purposes of applying the lump sum income rule, the Fourth Circuit found that, in adopting 42 U.S.C. §602(a)(17), Congress intended to reach only payments that would ordinarily be considered income and not all large payments of money. 774 F.2d at 1273-1275 (Pet. App. 14-17).

The court of appeals also held that Virginia's regulation applying the lump sum income rule to personal injury awards but not to property settlements was arbitrary and inequitable and thus violated the equitable treatment regulation, 45 C.F.R. §233.10(a)(1). 774 F.2d at 1275 (Pet. App. 16) The court of appeals said, "...The AFDC program was designed to assist the needy; the state by imposing inequitable eligibility requirements thwarts that purpose and runs afoul of regulations aimed at ensuring fair and unarbitrary treatment." Id.

The Petitioner, but not the Secretary of HHS filed a Petition for Rehearing en banc with the Fourth Circuit, which was denied. The federal government also did not join in Petitioner's post judgment motion to stay the mandate pending application to the U.S. Supreme Court for a writ of certiorari. That motion was

granted on November 21, 1985. Finally, the Secretary of HHS has not petitioned this Court for a Writ of Certiorari and has expressly waived his right to file a response to the petition filed by Virginia DSS, by a Waiver filed February 19, 1986.

II. SUMMARY OF ARGUMENTS

The Petition for Writ of Certiorari filed by the State of Virginia should be denied. This case does not raise a substantial Federal question, nor do conflicting decisions exist which justify the expenditure of this Court's time. None of the considerations specified by Rule 17.1 warrant the granting of a writ. The Secretary of HHS, who was an active litigant in the courts below, has not asked this Court for a writ and has expressly waived his rights to respond to Virginia's petition. This posture of the federal agency responsible for administering the AFDC program nationwide also demonstrates that this case should not be accepted for review.

Both opinions below held that Virginia's policy of treating personal injury awards as "lump sum income" violates the Social Security Act in several respects. Finding that neither the statute nor regulations define the word "income", the courts appropriately looked at that word's common meaning to derive Congress' intent in adopting the lump sum income rule. Consistent with its common usage, as well as numerous examples in other contexts, the courts found that personal injury awards, which compensate an individual for damage to one's body, could not be "income" since no gain occurs. The courts could find no legitimate justification for Virginia's treatment of a personal injury award in a punitive fashion while money received for property damage was not. Virginia's regulatory scheme creates an irrational system which contravenes the letter and the purposes of the Social Security Act and regulatory requirements.

The decisions below are based on long standing principles of statutory construction, consistent with more than 40 years of Federal AFDC policy related to income and resources, and suppor-

tive of the equitable treatment of recipients. Courts in eight states have reached similar conclusions.

The decision below does not conflict with any decision of another federal court of appeals. In fact, in the only other court of appeals opinion to date, the Third Circuit also held that personal injury awards could not be treated as lump sum income, relying on Pennsylvania state law. While cases are now pending in three courts of appeal, at this time no conflict exists, and the granting of this writ would be premature.

Three federal district courts and one state supreme court have reached decisions which are contrary to the opinion of the Fourth Circuit. However, in each of those cases, the court did not evaluate all the issues considered by the Fourth Circuit. In several several of these inconsistent cases the courts found that all large payments fall under the lump sum rule. This is simply not so. The federal government and the state of Virginia have acknowledged throughout this litigation that the lump sum income rule does not apply to every large payment of money. Indeed, Virginia's state regulations incorporate numerous examples of the kinds of payments which fall outside the scope of the lump sum income rule, such as payments for property damage and payments from insurance policies owned by families.

Petitioner asks this Court to grant its petition in order to assure consistency in the administration of the AFDC program nationwide. As evidenced by its decisions not to join in post judgment motions in the Fourth Circuit nor take any part at this stage of appeal, HHS does not share Virginia's concerns and is content to allow the Fourth Circuit opinion to stand. This request for uniformity provides no basis for granting the petition.

Every state and territory operates an AFDC program which is unique and different in numerous respects. Congress has designed a program which gives options to the states in terms of the scope of eligibility, levels of benefits, exemptions of resources and administrative procedures. Regarding the lump sum income rule, the length of disqualification will vary from state to state depending upon state established standards of need; states are allowed to choose options for shortening disqualification periods and for starting the disqualification. Even state law definitions of personal injury awards may vary. Just as the Third Circuit looked at Pennsylvania law to analyze the issue, the Fourth Circuit considered, in part, Virginia case law which describes the purpose and scope of a personal injury award. Finally, states may have different ways of treating property damage payments. It was extremely significant to the Fourth Circuit that Virginia DSS does not treat property damage settlements as income.

Thus, the lump sum income rule can be subject to different interpretations and implemented in dissimilar fashions. The statutory and regulatory framework of the AFDC program contemplate the variations. This Court need not and surely cannot review every case in which such differences exist in the AFDC program or in any other state/federal cooperative program where latitude is given to the states to design individual program requirements.

In a new theory, Petitioner also contends that the ruling below contravenes established standards of review set by this Court and seeks review of Virginia's regulations under constitutional standards of the equal protection rational basis test. This position has no merit. The Respondents have never objected to the lump sum income rule on constitutional grounds, and the decisions below rest on statutory and regulatory provisions.

Nevertheless, the district court specifically recognized its limited scope of review and characterized Virginia's regulatory scheme as "unreasonable" and "irrational". Likewise, the Fourth Circuit rejected each of Petitioner's efforts to justify the disparate treatment of funds from personal injury and those representing property. The Fourth Circuit found a violation of the federal regulation which prohibits "arbitrary or unreasonable" eligibility conditions and also prohibits "inequitable treatment of individuals". That regulation imposes standards which are independent from the equal protection rational basis test and are binding on all states administering an AFDC program. Petitioner's arguments, if accepted, would render the regulatory provision absolutely meaningless.

Therefore, because there are no substantial federal questions of law or conflicting decisions among the circuits for this Court to resolve, the Petition for a Writ of Certiorari should be denied.

III. ARGUMENT

A. THIS CASE DOES NOT RAISE A SUBSTANTIAL QUESTION WHICH JUSTIFIES GRANTING A WRIT OF CERTIORARI

1. THE FOURTH CIRCUIT OPINION IS BASED ON ESTABLISHED PRINCIPLES OF STATUTORY CONSTRUCTION AND IS CONSISTENT WITH FEDERAL AFDC POLICY.

Petitioner argues that the decisions below misread legislative history, improperly fail to give weight to the pre-enactment opinion of the Secretary of HHS as to the scope of the lump sum rule, and ignore the purposes of the OBRA amendments in general. None of these arguments has merit.

Petitioners insist that Congress intended all large payments of money and all insurance awards to be evaluated under the lump sum income rule. That position is contrary to the language of the statute, legislative history, the federal regulations, and Petitioner's own policies which specifically remove many payments, including certain insurance settlements, from the purview of the lump sum rule.

The clear language of 42 U.S.C. §602(a)(17) expressly applies the extended disqualification provision of the lump sum income rule to "income" and not to "resources". (Pet. App. 63). Similarly, the federal regulation implementing the above statutory change also applies expressly to "income". 45 C.F.R. §233.20(a)(3)(ii)(D). (Pet. App. 68).

Congress clearly did not intend for all lump sums of money to fall under the scope of the lump sum income rule. The Senate Finance Committee, when considering the appropriate statutory language commented as follows:

> Under present law, any payments that meet the definition of income (e.g., retroactive Social Security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually

> considered a resource in the month thereafter. The committee amendment would require that large payments, together with other income remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program. If such income exceeds the standard of need, the household would be ineligible for aid. (emphasis added).

S. REP. NO. 97-0139, 97 Cong., 1st Sess. 436, reprinted in 1981 U.S. Code Cong. & Ad. News 693 at 702. (Res. App. 1).

The Fourth Circuit found this language compelling. It stated:

> We believe that this language unmistakably reveals Congress' intent to reach only those payments in the OBRA lump sum rule which would ordinarily be considered income, not all large payments of money.

774 F.2d at 1275 (Pet. App 15)

Petitioner's focus on Secretary Schweiker's (then Secretary of HHS) description of the draft bill amending the Social Security Act in 1981 lends no support to its position. According to the Secretary, states would be mandated to apply the lump sum rule to "large payments, such as lump-sum payments of insurance proceeds, or retroactive benefit payments." (Pet. App. 93) It is significant that, in its actions, Congress did not adopt Schweiker's interpretation. In its final conference report, Congress did not include one of the examples provided by Secretary Schweiker. As their single example of lump sum income, the Senate Finance Committee mentions "retroactive social security benefits" --precisely the type of payment which historically has been viewed by HHS and its predecessors as falling into the "income" category.[3] Nowhere in the Committee Reports are

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[3] Over the past twenty-five years, the federal agency responsible for administration of the AFDC program has offered examples of payments constituting income. These consistent interpretations also support the Fourth Circuit's decision that bodily injury awards are not income, and one court has so ruled. LaMadrid v. Hecstrom, 599 F.Supp. 1450, 1455 (D.C. Ore. 1984), appeals docketed Nos. 85-3704 and 85-3719 (9th Cir. 3/14/85) The joint appendix filed below contains several policy memos and interpretations which illustrate this longstanding policy .

"insurance proceeds" even mentioned. It also is significant that HHS, contrary to the statement of Secretary Schweiker, does not mandate that all states treat all insurance proceeds as lump sum income. Property insurance proceeds are treated as a resource. Thus, the Secretary's statements in May 1981 were not adopted by Congress, HHS, or the State of Virginia.[4]

Furthermore, the Fourth Circuit did not, as Petitioner states, ignore the purposes of the OBRA amendments. Indeed, the court specifically acknowledged that with the lump sum income rule, "...Congress hoped to encourage recipients to budget large sums to meet needs over a longer period of time, thereby easing the burden on the public fisc...." 774 F.2d at 1274 (Pet. App. 14) However, the court found that "income" had not been redefined by OBRA, and the lump sum income rule could have no application to personal injury awards which, according to common meaning and usage, are not "income".

Throughout their analyses, the courts below considered the disparate treatment of personal injury awards when compared with Virginia's treatment of property awards. This disparate impact, characterized as "unconscionable" and "irrational" by the district court, was viewed by the Fourth Circuit as "inequitable" and contrary to the "regulations aimed at ensuring fair and unarbitrary treatment..." 774 F.2d at 1275 (Pet. App. 16).

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4 Citing to proposed HHS regulations, Petitioner states that HHS has now concluded that the lump sum income rule applies to all lump sum payments of money. (Petition, p. 6, fn. 6). That comment is extremely misleading since 1) the proposals, published more than 16 months ago, have never been adopted by HHS; 2) the proposal refers only to "windfalls" which would have to be treated under the lump sum income rule, and nowhere in the proposal is personal injury compensation even mentioned; and 3) even if "windfall" regulations are adopted someday by HHS, the treatment of personal injury awards would not be affected, because they are not windfalls. Barnes v. Cohen, 749 F.2d 1009, 1017 (3rd Cir. 1984)

The examples set forth by the district court clearly demonstrate the irrationality of Virginia's regulatory scheme. See, 591 F. Supp. at 1254 (Pet. App. 42-43). Money received for a home destroyed by fire is a resource and can be spent by the individual as needed, while money for burns to the individual's body is income, and the lump sum disqualification applies. Insurance payments after an automobile accident are viewed by DSS in various bizarre fashions. Payments for damage to the vehicle are always a resource. However, injuries sustained in a car accident lead to lump sum disqualifications when damages are paid by the other driver but not when the family's own insurance pays for the injuries. Petitioner's strained efforts to explain these distinctions failed to convince the courts below. (See, discussion, infra p. 21)

The tragic consequences of this irrational system are apparent. Those unfortunate families whose members have suffered severe bodily injury are punished while families which have experienced a mere material loss are not so penalized. These results are totally unreasonable and entirely contrary to the purposes of the ADC program.

The stated purpose of the ADC program is to:

> "...furnish financial assistance...to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self support and personal independence consistent with the maintenance of continuing parental care and protection...". 42 USC §601.

Certainly, the financial need of a dependent child whose mother has been injured in a car accident is no less than the need of the child whose mother's car is wrecked in an accident. For example, a $550 personal injury award would disqualify an

AFDC family of two in Virginia for 2 months, but a $550 property damage award itself carries no disqualification penalty. The financial needs of children in each situation are identical. DSS policies deny the former child any assistance at all.

Petitioner's eligibility conditions totally ignore the purposes of the Social Security Act and arbitrarily deny certain children desperately needed financial assistance. The Court of Appeals was entirely correct:

> This effect is inequitable and puts the injured recipient in an untenable position when compared to the recipient who has lost a more concrete and tangible resource. The AFDC program was designed to assist the needy; the state by imposing inequitable eligibility requirements thwarts that purpose and runs afoul of regulations aimed at ensuring fair and unarbitrary treatment. See 45 C.F.R. §233.10(a)(1). (Pet. App. 16)

Most of the courts which have considered this issue have agreed that personal injury awards are not properly evaluated under the lump sum income rule.[5]

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[5] See, Barnes v. Cohen, 749 F.2d 1009 (3rd Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2126 (1985); LaMadrid v. Hegstrom, 599 F. Supp. 1450 (D.C. Ore. 1984), appeals docketed Nos. 85-3704 and 85-3719 (9th Cir. 3/14/85); White v. Rahm, Civ. No. (85-0071 (W.D. Wa. Feb. 8, 1985), appeal docketed No. 85-3975 (9th Cir. 7/5/85); Payne v. Toan, No. 84-4085-CV-C-5 (W.D. Mo. Sept. 16, 1985), appeal docketed No. 85-2494-W.M. (8th Cir. 12/20/85). [The state of Missouri has not joined the federal defendant in this appeal.] In addition to these final decisions, in Taggart v. Perales, No. CV-83-159-T (W.D. N.Y., consent judgment filed April 13, 1984), New York agreed to cease its policy of treating certain Workers Compensation awards as income in its AFDC program; and preliminary injunctions have been entered for individuals in West Virginia and Nevada, Miller v. Lord, No. 2:85-0500 (S.D.W.V. May 16, 1985) (preliminary injunction), Johnson v. Griepentrog, Civ. No. 85-914 (HDM)(D.C. Nev. Nov. 12, 1985) (preliminary injunction).

In state court activity, California settled class action litigation by agreeing, in part, to exclude personal injury awards from lump sum income treatment, Stephens v. McMahon, No. 528588 (Sup. Ct. San Diego Nov. 8, 1984) (stipulation for judgment and order).

2. THE FOURTH CIRCUIT OPINION DOES NOT CONFLICT WITH ANY DECISIONS OF ANOTHER FEDERAL COURT OF APPEALS.

The only other court of appeals which has reviewed the question here has reached the same result, although on state law grounds. Barnes v. Cohen, 749 F.2d 1009 (3rd Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2126 (1985). Finding state law dispositive, the Third Circuit ruled that the lump sum income rule does not apply to personal injury awards under Pennsylvania's AFDC regulations. Barnes, at 1018. In Pennsylvania, the AFDC lump sum rule applied only to "windfalls". The Third Circuit specifically held that, by definition, a personal injury award was compensation to the injured party -- thus no "windfall" was realized. The Court held that Pennsylvania could not treat personal injury awards as a "windfall" covered by its AFDC lump sum income rule. Barnes v. Cohen, 749 F.2d 1009, 1017 (3rd Cir. 1984).

Defendants have misled this Court by suggesting that the cases of Walker v. Adams, 741 F.2d 116 (6th Cir. 1984) and Sweeney v. Murray, 732 F.2d 1022 (1st Cir. 1984) constitute conflicting court of appeals opinions. The First and Sixth Circuits were not presented with the issue here. The courts did not consider nor evaluate the issue here. It is an elementary principle of stare decisis that

> ...a decision of an appellate court constitutes a precedent only insofar as it determines some issue of law properly before it for review.

IB J. Moore, Federal Practice, ¶0.402[2], at 29 (2d ed. 1984). The Sweeney and Walker courts were presented with an entirely different legal question about the lump sum income rule. Any comment by those courts that the rule's scope includes personal injury awards is irrelevant dicta.

In Walker and Sweeney the question was "Does the lump sum income rule apply to AFDC families which have no earned income?". The question in the Fourth Circuit was "Does the lump sum income rule apply to receipts of personal injury awards".[6] The conclusions reached in Sweeney and Walker have nothing to do with the conclusions reached by the Fourth Circuit. Thus it is particularly misleading for Petitioners to state that the Fourth Circuit reached a "contrary conclusion" from the First and Sixth Circuits "after examining the same legislative history". The Courts in Walker and Sweeney were looking at the legislative history for an entirely different purpose and to find a different answer.

Cases concerning the personal injury question are now pending in the Ninth Circuit,[7] the Seventh Circuit,[8] and the Eighth Circuit.[9] It would be far more expeditious for this Court to allow those circuits to follow the lead of the Third and Fourth Circuits, with the potential for uniformity, rather than to prematurely accept this case now, when no conflict between circuits exists.

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6 Both of these questions were also raised by Respondents in the district court below. The district court concluded that the lump sum income rule did apply to families without earned income, and Respondents did not appeal that issue. 591 F.Supp. at 1256-1257 (Pet. App. 37-41). The two issues are clearly separate and independent.

7 LaMadrid v. Hegstrom, 599 F. Supp. 1450 (D.C. Ore. 1984), appeals docketed Nos. 85-3704 and 85-3719 (9th Cir. 3/14/85), White v. Rahm, Civ. No. C85-0071 (W.D.Wa. Feb. 8, 1985), appeal docketed No. 85-3975 (9th Cir. 7/5/85).

8 Davis v. Coler, 601 F. Supp. 444 (N.D.Ill. 1984), appeal docketed No. 85-2481 (7th Cir. 8/29/85), Watkins v. Blinzinger, 610 F. Supp. 1443 (S.D. Ind. 1985), appeal docketed No. 85-2366 (7th Cir. Aug. 8, 1985)

9 Payne v. Toan, No. 84-4085-CV-C-5 (W.D. Mo. Sept. 16, 1985), appeal docketed No. 85-2494 W.M. (8th Cir. 12/20/85).

3. THE DECISIONS OF ONE STATE COURT AND THREE DISTRICT COURTS WHICH ARE NOT CONSISTENT WITH THE FOURTH CIRCUIT OPINION DO NOT JUSTIFY THE GRANTING OF A WRIT.

Only four courts have upheld a state's treatment of personal injury awards as lump sum income.[10] These decisions do not create the type of conflict which justifies this Court's review because none considered all the issues considered by the Fourth Circuit, and further, because the AFDC statute and regulations contemplate variations in state policies.

a. THE DECISION FROM THE MAINE SUPREME COURT IS ERRONEOUS.

The Maine Supreme Court is the only state court of last resort which has addressed the personal injury question in Littlefield v. Maine, 480 A.2d 731 (Me. 1984). That court did not conclude, as Petitioner implies, that personal injury awards are "income" under the lump sum rule. Instead, the court held that the lump sum rule applies to "...all lump sum acquisitions, whether labeled income or resources." Id. at p. 740 (Emphasis added). That sweeping conclusion is contrary to the statute, to legislative history, to Petitioner's position in this case, and to Petitioner's actual practices. In addition, the Littlefield court did not consider the disparate treatment between personal injury and property damage awards, which the Fourth Circuit carefully analyzed and found to violate the equitable treatment regulation. Thus, the Littlefield decision does not constitute a conflict which warrants review by this Court.

b. THE DISTRICT COURT DECISIONS FAIL TO CONSIDER THE INEQUITABLE TREATMENT OF FAMILIES WHO RECEIVE PERSONAL INJURY AWARDS AS COMPARED TO THOSE WHICH RECEIVE PROPERTY DAMAGE PAYMENTS.

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10 Littlefield v. Maine, 480 A. 2d 731 (Me. 1984), Jackson v. Guissinger, 589 F.Supp. 1288, (W.D. La. 1984); Davis v. Coler, supra, footnote 8, Watkins v. Blinzinger, supra, footnote 8.

None of the three federal district courts which have ruled that personal injury awards can be included within the definition of lump sum income considered the inequitable treatment between personal injury awards and property damage awards. That consideration was a critical part of the Fourth Circuit's decision. In fact, the decisions do not mention how property damage settlements are treated by the administering agencies in those states nor whether that issue was even raised by plaintiffs there.

c. THE AFDC PROGRAM HAS NEVER BEEN A SINGLE UNIFORM PROGRAM NATIONWIDE.

Petitioner asks this Court to grant its petition in order to assure consistency in the administration of the AFDC program nationwide. This request for uniformity provides no basis for granting the petition, since every state and territory operates an AFDC program which is unique and different in numerous respects. Congress has designed a program which gives options to the states for evaluating "need", 42 USC §602(a)(7)(A), exempting resources, 42 USC §602(a)(7)(B), counting in-kind benefits, 42 USC §602(a)(7)(C) and (36), counting earnings 42 USC §602(a)(8)(A), using monthly reports and retrospective accounting, 42 USC §602(a)(13), developing employment programs and job search activities, 42 USC §602(a)(19) and (35), and setting standards of need, 42 USC §602(a)(23).

Regarding the lump sum rule in 42 USC §602(a)(17), different standards of need from state to state result in disqualification periods of different lengths. For example, a family of three in Richmond, Virginia which receives a $5,000 inheritance is disqualified under the lump sum rule for 1 year and 3 months, while a family of three in Charlotte, North Carolina is disqualified for only 10 months. Beginning in October 1984 Congress also gave states the option to shorten lump sum

disqualifications in certain hardship situations. 42 USC §602(a)(17) added by Pub. L. 98-369, §2632(a), July 19, 1984. Some states have adopted these provisions, others have not.

In fact, HHS's position in policy memoranda and in briefs filed in this litigation has been that states have the option of treating personal injury awards as income or resources. That position was rejected by the Fourth Circuit because of Virginia's disparate treatment of personal injury awards and other payments for loss. 774 F.2d at 1275 (Pet. App. 15). To reach this conclusion, the Fourth Circuit looked to Virginia's state law for a characterization of personal injury awards in tort litigation, and looked to Virginia's regulatory treatment of property awards in its AFDC program. States which have different common law on personal injury recoveries or different AFDC policies on property awards may well reach different conclusions on the issue presented to the Fourth Circuit. The statutory and regulatory framework of the AFDC program contemplates these variations.

This Court could not possibly review every case where variations exist in AFDC programs. This Court properly denied the petition for certiorari filed by the state of Pennsylvania in Barnes v. Cohen, supra, and should deny the petition here.

In this case, HHS, although actively a litigant in the district court and in the Fourth Circuit, has chosen not to petition for a Writ of Certiorari nor to file a brief in response to Virginia's petition. Since HHS appears satisfied with the Fourth Circuit opinion, Virginia's plea for uniformity nationwide rings hollow.

B. THE RULING BELOW DOES NOT CONTRAVENE ESTABLISHED STANDARDS OF REVIEW SET BY THIS COURT.

Petitioner also contends that the ruling below contravenes

established standards of review set by this Court. Petitioner complains that the Fourth Circuit should have utilized the analyses involved in constitutional challenges based upon the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. This argument is groundless and in no way supports Virginia's petition for a Writ of Certiorari.

Even though constitutional issues were never raised, the courts below did analyze Virginia's explanations for its regulations to determine whether they were "rational". In fact, the district court specifically acknowledged that the standard of review was "limited", and, citing to Dandridge v. Williams, 397 U.S. 471 (1970), that the regulatory scheme could not be rejected unless it lacks a "reasonable basis". 591 F.Supp at 1255. (Pet. App. 44) The district court concluded that it is "irrational to treat a damaged car or home more favorably than a damaged body." 591 F.Supp. at 1257 (Pet. App. 51)

The Fourth Circuit, in affirming the district court in all respects, also utilized a narrow standard of review to determine whether Virginia's regulation was consistent with the federal equitable treatment regulation. 45 CFR §233.10(a)(1). In the Fourth Circuit Petitioner offered two explanations for its disparate treatment of personal injury and property damage awards. First, Virginia DSS explained that payments for property damage are not treated as lump sum income because DSS assumed that individuals would use the money to replace the lost property. Second, Petitioners claimed that the distinction was rational because before disqualification periods were established, policy allowed recipients who received personal injury awards to deduct expenses related to the injury which were expended prior to and 30 days after the money was received.

The Fourth Circuit rejected these explanations for several

reasons: 1) it was not persuaded by Virginia's assumption that persons receiving property damage awards would use those funds to replace the resource; 2) the policy places a restriction on persons who cannot go into the market to replace his losses due to pain and suffering; 3) the offset rule imposes an arbitrary time limitation on deductions for expenses related to personal injury which are not applicable to property damage awards. The Fourth Circuit concluded that there was no justification for Virginia's policies which were inequitable, unfair and arbitrary.[11] 774 F.2d at 1275 (Pet. App. 16).

Thus, both courts below utilized the very standards which Virginia now seeks. The courts analyzed Virginia DSS's regulations to find some legitimate support for them. Despite this narrow scope of review, the courts determined that the disparate treatment was irrational and could not be used to disqualify otherwise eligible individuals.

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[11] Petitioner now states that regulations adopted by Virginia DSS in September 1985 cure any previous inequity. (Petition, p. 22). These new regulations allow an individual who is disqualified from AFDC because of the lump sum rule to shorten the disqualification by documenting the use of the lump sum money for certain hardship needs, including medical treatment. That regulatory change adds no strength to Virginia's petition. First, it has no bearing on the Fourth Circuit's initial conclusion that Congress did not intend the evaluation of personal injury awards as lump sum income; Second, the regulation was not <u>implemented</u> by DSS until November 14, 1985, after the judgment was issued by the Fourth Circuit (Res. App. 4); Third, the regulation does absolutely nothing to change the primary inequity recognized by the Fourth Circuit - the restriction placed on individuals who can not go into the marketplace to "replace" pain and suffering losses; Fourth, the regulation does nothing to cure the arbitrariness noted by the Fourth Circuit since the latent consequences of the personal injury may fall <u>outside</u> the disqualification period; and finally, the inequity continues in a very practical sense because the injured recipient, told he must use the personal injury award for subsistence living expenses for months into the future, may forego medical treatment.

It should also be emphasized that the Fourth Circuit properly found a violation of the federal regulation without mentioning constitutional principles expressly. When this Court found a violation of 45 CFR §233.10(a)(1) in Blum v. Bacon, 457 U.S. 132 (1982), this Court specifically found that the regulation was "dispositive of the case" and found it unnecessary to reach the constitutional equal protection claim (which had been expressly raised in that case). Blum at 138.

Thus, the Blum decision makes it perfectly clear that the equitable treatment regulation creates standards which are separate and apart from the equal protection clause. As the Secretary of HHS explained in Blum, the equitable treatment regulation was promulgated as a "rule necessary for the proper and efficient operation" of the AFDC program, under the authority given the Secretary in 42 USC §602(a)(5). Blum at 140, fn. 8. Petitioner's position here would render the regulation and this Court's decision in Blum absolutely meaningless.

The Fourth Circuit correctly found a violation of 45 C.F.R. §233.10(a)(1), because the distinction between personal injury and property damage awards is inequitable and arbitrary. 774 F.2d at 1275 (Pet. App. 16). The language of the regulation is perfectly plain and straightforward:

> [The state plan must] specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act....(emphasis added)

45 C.F.R. 233.10(a)(1). (Pet. App. 66). This regulation is not

unlike a "rational basis" test, and it is entirely appropriate and binding on the states.

The inequity here is obvious. Had the members of the Plaintiff class lost a home or a car instead of suffering bodily injury, they could have received ADC benefits again when the remaining funds were less than resource limits. Petitioner's arbitrary, unreasonable and inequitable regulation, however, has resulted in absolute disqualifications from the program which have continued long after all the family's funds were gone.

While it is clear that Petitioner is dissatisfied with the conclusions reached by the courts below, it is equally clear that an appropriate standard of review was utilized. HHS has not complained about the Fourth Circuit's interpretation of one of its own regulations. HHS's decision not to appeal must be viewed as an acceptance -- if not an endorsement -- of the decision below.

The court of appeals rejected Petitioner's attempts to justify the distinction: HHS has not appealed the ruling below. There is no need for further review by this Court.

IV. CONCLUSION

Petitioner has raised no issues which, under Rule 17 of the Rules of this Court would justify the grant of a Writ of Certiorari. There is no conflict present between federal courts of appeal, and it would be premature to accept this case so long as potentially uniform decisions may be rendered by the circuits which are now considering the issue. The decision from Maine also does not justify this Court's time since the Maine Supreme Court did not consider all the issues which were analyzed by the Fourth Circuit, and that Court made sweeping statements of law which are not correct.

Petitioner's concerns about nationwide uniformity in the AFDC program are in no way compelling, given the wide variations in programs and HHS's decision not to appeal the Fourth Circuit opinion. Likewise, the Petitioner's claim that the standard of review utilized below was improper carries no weight. The courts did use a narrow standard, and, again, it is significant that HHS has not objected to the court's conclusion that one of its own regulations was violated by Virginia's policies.

While courts in many states have considered or are now considering the personal injury question, the majority of the decisions are consistent with the Fourth Circuit opinion. Moreover, in every decision where the inequitable treatment between money for property loss and personal injury was considered courts have found the disparity irrational.

For these reasons, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,
ONA MAE REED, et al.,

by _____
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V. AFFIDAVIT OF FILING AND SERVICE

STATE OF VIRGINIA
CITY OF RICHMOND, to-wit:

Jill A. Hanken, being first duly sworn, deposes and says:

1. I am counsel of record in this case for the Respondents, ONA MAE REED, et al., and a member of the Bar of this Court.

2. On March 12, 1986, pursuant to Supreme Court Rules 28.2, and 46.2, and within the time permitted for filing, I caused to be mailed, first class, postage prepaid, at the United States Post Office, Richmond, Virginia 23219, addressed to The Honorable Joseph F. Spaniol, Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543, the original of (a) the attached Brief in Opposition to Petition for Writ of Certiorari, and (b) Motion for Leave to Proceed in Forma Pauperis, with accompanying affidavits.

3. On March 12, 1986, pursuant to Supreme Court Rule 28.5, I also caused to be mailed, first class, postage prepaid, at the same Post Office, a copy of (a) the attached Brief in Opposition for Writ of Certiorari, and (b) Motion for Leave to Proceed in Forma Pauperis with accompanying affidavits, to each of the following persons:

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I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed this 12th day of March, 1986, at Richmond, Virginia.

Jill A. Hanken

Jill A. Hanken

The foregoing instrument was subscribed and sworn to before me, a Notary Public in and for the State and City aforesaid, on this 12th day of March, 1986, by Jill A. Hanken.

Edward N. Waylor

Notary Public

My commission expires: June 16, 1990

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Count lump-sum payments.—Under present law, any payments that meet the definition of income (e.g., retroactive social security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered a resource in the months thereafter.

The committee amendment would require that large payments, together with other income remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program. If such income exceeds the standard of need, the household would be ineligible for aid. Any amount of the income that exceeds the monthly needs standard would be divided by the monthly needs standard, and the household would be ineligible for aid for the number of months resulting from that calculation. Any remaining amount would be counted as income in the first month following the period of ineligibility.

303.3 PROPERTY IN EXCESS OF ALLOWABLE RESERVES - When an otherwise eligible child and his parent(s) living in the home have cash and/or liquid assets, other than the reserved items listed above, totaling more than $600, the resource must be examined to determine ownership and unless designated as a resource to one of the eligible children, eligibility will not exist (see Section 302.6).

All loans, except those obtained for current living expenses, will be considered an available resource. Current living expenses shall include items such as the cost of food, clothing, shelter and other day to day living expenses for the current month in which the loan was received. For example, a loan obtained to buy a car is considered a resource. A loan received to pay current rent is considered income. See 305.4C.

When any of the reserved items listed in 303.2 above OR ANY OTHER REAL OR PERSONAL PROPERTY OWNED BY AN INDIVIDUAL WHOSE RESOURCES ARE CONSIDERED IN DETERMINING ELIGIBILITY ARE SOLD OR transferred into cash or other liquidable assets, these items are resources and will be considered in relation to the allowable reserve.

Example #1: Ms. C sells her exempted vehicle and receives $500 from the sale. The agency will consider this sum of money in relation to the allowable reserve.

Example #2: Ms. M loses her exempted home as a result of a fire. She receives an insurance settlement in the amount of $20,000. This money is a resource and will be considered in relation to the allowable reserve.

* * *

[redacted]

COMMONWEALTH of VIRGINIA

DEPARTMENT OF SOCIAL SERVICES

[redacted]

December 27, 1982

AID TO DEPENDENT CHILDREN

Supplement 1 to
ADC Transmittal #82

The attached material consists of revisions to the ADC Manual as a result of a recent court decision in the following areas:

A. Section 303.3 has been revised to reflect that when any resource is sold or converted to cash, the proceeds are to be considered as a resource.

B. Section 305.4 has been revised to reflect that the proceeds derived from the sale or conversion of real or personal property are not considered a lump sum. For example, when an insurance policy owned by the assistance unit is cashed in or pays off, the money received will not be considered a lump sum.

The attached material is effective January 1, 1983 and is to be incorporated into the ADC Manual as follows:

Section 303.1 - 303.3, page 1, dated 1/83 (1 sheet) to replace Section 303.1 - 303.3, page 1, dated 7/82 (1 sheet).

Section 305.4, page 11, dated 1/83 (1 sheet) to replace Section 305.4, page 11, dated 7/82 (1 sheet).

William L. Lukhard

COMMONWEALTH of VIRGINIA
DEPARTMENT OF SOCIAL SERVICES

November 6, 1985

ADC Transmittal #100

AID TO DEPENDENT CHILDREN

The State Board of Social Services has elected to adopt the policy for shortening the period of ineligibility due to the receipt of a lump sum, as provided by the Deficit Reduction Act (DEFRA) of 1984.

The information contained in this transmittal is effective November 14, 1985. Additionally, applicants and recipients who are in a period of ineligibility which was established prior to November 14, 1985 will be <u>reevaluated</u> based on this policy, upon reapplication. The usual <u>reapplication</u> procedures are applicable. Retroactive benefits are not to be made; however, this policy is applicable to lump sum ineligibility periods established prior to November 14, 1985.

Section 305.4.C has been changed to identify the conditions under which a lump sum period of ineligibility can be shortened.

Section 401.6 has been revised to require an explanation to the applicant/recipient of the provisions for shortening the period of ineligibility.

The attached material is to be incorporated into the ADC Manual as follows:

Section 305.4, pages 11c-11f, dated 11/14/85 (4 sheets) to replace Section 305.4, pages 11c and 11d, dated 10/85 (2 sheets).

Section 401.6, pages 12 and 12a, dated 11/14/85 (2 sheets) to replace Section 401.6, page 12 and 12a, dated 10/84 and 10/85 (2 sheets).

William L. Lukhard

Supreme Court, U.S.
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CLERK

No. 85-1358

In the Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM L. LUKHARD, COMMISSIONER
OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
PETITIONER

v.

ONA MAE REED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
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QUESTION PRESENTED

Whether the Social Security Act requires that lump-sum personal injury awards be treated as "resources," rather than "income," for purposes of computing eligibility for and amount of AFDC benefits.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 774 F.2d 1270. The opinion of the district court on summary judgment (Pet. App. 23-54) is reported at 591 F. Supp. 1247. The opinion of the district court on the preliminary injunction is reported at 578 F. Supp. 40.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1985. A petition for rehearing was denied on November 14, 1985 (Pet. App. 55-57). The petition for a writ of certiorari was filed on February 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Aid to Families with Dependent Children (AFDC) program, Title IV, Part A, of the Social Security

Act (42 U.S.C. 601 *et seq.*), the federal government provides matching funds to states for the purpose of furnishing assistance to families with needy children. States participate in the AFDC program at their option, and at the present time all states do participate. In order to be eligible for matching funds, a state must administer its AFDC program in conformance with a state plan approved by the Secretary of HHS that embodies the requirements set forth in the Act and underlying federal rules and regulations. See Section 402(a) of the Act, 42 U.S.C. 602(a); 45 C.F.R. 201.0 *et seq.*

In order to determine a family's eligibility for AFDC payments, the state distinguishes between the family's "income" and its "resources". If the family's countable resources in a given month exceed a state-specified resource limit (subject to a federally prescribed maximum of $1,000, 42 U.S.C. 607(a)(7)(B)), the family is not eligible to receive AFDC benefits that month. By the same token, if its countable income in a particular month is above a state-specified need standard, the family also is ineligible for AFDC benefits.

Prior to 1981, when an AFDC recipient received a lump sum from any source, such as an insurance settlement or lottery winnings, the money was treated as income in the month received and as resources in succeeding months. Because of concern that this treatment tended to encourage recipients to dissipate the lump sum quickly (because they would become eligible for benefits again as soon as their resources dropped below the resource limit), Congress enacted a new rule in the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, § 2304, 95 Stat. 845, addressing the proper treatment of lump sums. The statute now provides that lump sum income is to be prorated over a period of months determined by dividing the sum (and other countable income) by the applicable monthly need standard. Section 402(a)(17), 42 U.S.C. 602(a)(17), *reprinted at* Pet. App. 64-65. The result

of this amendment is that, with limited exceptions not relevant here, the receipt of a substantial lump sum will make the recipient ineligible for AFDC payments for several months, even if the lump sum is dissipated before that period expires. See Pet. App. 6-7.

2. Three of the private respondents brought this class action suit in the Western District of Virginia to challenge the application of the lump sum rule to personal injury awards that they had received. Respondent Reed and her two minor children had been receiving AFDC benefits of $233 per month when she was awarded a lump sum workers' compensation payment of $5,400 in June 1982. Petitioner, the Commissioner of the Virginia Department of Social Services applied the lump sum rule of 42 U.S.C. 602(a)(17) and found that the award made Reed ineligible for further AFDC benefits until approximately March 1984. Respondent Reed exhausted her lump sum income by August 1982. Respondents Long and Wilcher also received personal injury awards and similarly exhausted their lump sum before they could reapply for AFDC benefits. The plaintiffs sought immediate restoration of their AFDC benefits, although their ineligibility period computed under the lump sum rule had not yet expired, on the ground that a personal injury award was not "income" covered by 42 U.S.C. 602(a)(17). In June 1983, the court granted the plaintiffs' motion for a preliminary injunction, but denied class-wide preliminary relief. 578 F. Supp. 40.

On July 26, 1984, the district court certified the requested class and granted the plaintiffs' motion for summary judgment on the ground that personal injury awards are not subject to the lump sum rule (Pet. App. 23-51). The court found that the Secretary's interpretation of the statute, which permitted states to treat personal injury awards as income, was unreasonable. The court explained that the legislative history indicated that Congress did not intend that *all* lump sums would be treated as "income." In

the absence of any specific statutory or regulatory definition of income, the court looked to other sources, primarily dictionaries and the Internal Revenue Code, and concluded that personal injury awards did not meet the ordinary definition of income and hence should not be covered by the lump sum rule. Pet. App. 41-51.

The court of appeals affirmed (Pet. App. 1-22). The court noted that "[p]ersonal injury awards serve to make one whole, in effect restoring one to the status quo before the injury was suffered" (*id.* at 12). And the court explained that the enactment of the lump sum rule in OBRA was not intended to redefine income (*id.* at 14-15). The court therefore concluded that it was compelled to reject the agency's interpretation on the ground that "it conflicts with Congress' intent and because its disparate treatment of personal injury awards is inequitable and thus contrary to HHS' own guidelines" (*id.* at 13-14, citing 45 C.F.R. 233.10(a)(1)).

3. On March 18, 1986, subsequent to the court of appeals' decision and the filing of the petition in this case, the Secretary promulgated regulations clarifying the meaning of "income" subject to the lump sum rule. 51 Fed. Reg. 9191, 9205. The new regulation specifically identifies personal injury and workers' compensation awards as "income." The new regulation (51 Fed. Reg. 9205 (1986), to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F)) provides:

> When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income (including for AFDC, title II and other retroactive monthly benefits and payments in the nature of a windfall, e.g., inheritances or lottery winnings, personal injury and worker compensation awards, to the extent it is not earmarked and used for the purpose for which it is paid, i.e., monies for back medical bills

resulting from accidents or injury, funeral and burial costs, replacement or repair of resources, etc.), the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility.

ARGUMENT

The court of appeals' decision incorrectly invalidates a statutory interpretation by the expert agency that has recently been reaffirmed after an extended rulemaking proceeding. Because the decision affects numerous claimants in an important social welfare program and directly conflicts with a decision of another court of appeals, it is appropriate for this Court to grant certiorari to resolve the conflict and restore uniformity to the administration of this major nationwide program.

1. The agency interpretation in this case treating personal injury awards as income subject to the lump sum rule fully accords with the policies of the statute and with the apparent congressional intent. Congress was concerned that lump sum payments were being dissipated quickly with the result that families who had received lump sum payments were again on the AFDC rolls shortly after receiving such payments as soon as their resources dipped below the resource limit (see 42 U.S.C. 602(a)(7)(B)). The lump sum rule was designed to encourage AFDC recipients to budget monies received in a lump sum and spend them wisely to meet their current and future needs, rather than depending on AFDC assistance to pay for their subsistence as had been necessary before the lump sum was received. The legislative history evinces no intent to treat personal injury awards different from

other lump sum payments for these purposes. The Senate Committee Report explained the purpose of the OBRA amendment in broadly applicable terms:

> The commmittee believes that lump-sum payments should be considered available to meet the ongoing needs of an AFDC family * * *. The committee amendment would require that such income received in a month be considered available as income in the month it is received and also in future months.

S. Rep. 97-139, 97th Cong., 1st Sess. 505 (1981). And the House Committee had identified the amendment as intended to require the states "to consider *all* lump-sum payments as income available to meet a family's needs." Staff of House Comm. on Ways and Means, 97th Cong., 1st Sess., *Description of the Administration's Legislative Recommendations Under the Jurisdiction of the Ways and Means Committee* 53 (Comm. Print 1981 (emphasis supplied)).

The court of appeals' refusal to defer to the Secretary's interpretation was based in large part on its conclusion that a personal injury award was not gain to the recipient, but rather was designed to make him whole for the injury suffered. It does not necessarily follow from this conclusion, however, that personal injury awards should be treated as "resources," rather than "income" subject to the lump sum rule. To a large degree, the purpose of a personal injury award, and this is clearly manifested in the case of a workers' compensation award, is to compensate an individual for a reduction in earning capacity due to an injury. The award, while not gain in the sense that the recipient is financially better off than if he had not been injured, is designed as a substitute for income.[1] It is

---

[1] A portion of a personal injury award is often intended to compensate the individual for specific sums expended as a result of the accident, for example, medical expenses. This portion of the award is not

reasonable to expect the recipient to budget such an award to meet his future needs in order to offset the lack of future income that he will no longer be able to earn in light of his injury, and it therefore makes perfect sense for the award to be treated as income for purposes of the lump sum rule.

2. Subsequent to the court of appeals' decision in this case, the Seventh Circuit upheld the application of the lump sum rule to personal injury awards. *Watkins* v. *Blinzinger*, No. 85-2366 (Apr. 18, 1986). The court found that personal injury awards are "income in a fundamental sense," especially noting that much of the award may represent lost wages (slip op. 5). The court concluded that the Secretary's definition was "consistent with the will of Congress," which prescribed no restriction on the proper definition of income. The Seventh Circuit specifically noted that its decision created a conflict among the circuits because of its specific rejection of the instant case (*id.* at 4 n.4).

In light of the recent developments subsequent to the court of appeals' decision in this case, it is appropriate for the Court to grant certiorari here to resolve the conflict in the circuits and permit uniform administration of the AFDC program.[2] Respondents' suggestion (Br. in Opp. 12 n.4) that Supreme Court review of this issue may be un-

---

a substitute for income, but the Secretary's regulations would not treat it as such under the lump sum rule. Rather, any amount that is "earmarked and used for the purpose for which it is paid, i.e., monies for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair of resources" is to be excluded from the lump sum payment for purposes of applying the rule of Section 402(a)(17). 51 Fed. Reg. 9205 (1986), to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F); see also 51 Fed. Reg. 9197 (1986).

[2] If certiorari is denied here, the class-wide injunction entered by the district court (Pet. App. 53) against petitioner applying the lump sum rule to personal injury awards will remain in effect.

necessary because the Secretary's new regulations may exclude personal injury awards from lump sum income has not been borne out; after extended consideration, the Secretary has reaffirmed the administrative policy of treating personal injury awards under the lump sum rule. Respondents' suggestion (Br. in Opp. 16) that review by this Court is unnecessary because the other courts of appeals may all agree with the decision below has also proven incorrect. There is now a clear conflict in the circuits. While it is possible that the Fourth Circuit could reconsider its position in this case in light of *Watkins* and the new regulation, that appears unlikely in view of the fact that the court of appeals explicitly recognized that it was disagreeing with an agency interpretation that was entitled to deference (Pet. App. 13). Thus, it appears that, without intervention by this Court, the conflict in the circuits on this issue will persist and probably proliferate.[3] The orderly administration of the AFDC program and uniform treatment of recipients nationwide will be best served if the Court grants certiorari here and expeditiously resolves this conflict.

---

[3] District courts in other circuits are also sharply split on this issue. Compare *Coakley* v. *Sunn*, No. 85-1233 (D. Hawaii Apr. 2, 1986); *Jackson* v. *Guissinger*, 589 F. Supp. 1288 (W.D. La. 1984); *Betson* v. *Cohen*, 578 F. Supp. 154 (E.D. Pa. 1983), rev'd on other grounds, 749 F.2d 1009 (3d Cir. 1984), cert. denied, No. 84-1350 (Apr. 22, 1985) (upholding application of lump sum rule) with *LaMadrid* v. *Hegstrom*, 599 F. Supp. 1450 (D. Ore. 1984) and *White* v. *Rahm*, No. C85-0077 (W.D. Wash. Apr. 20, 1985), consolidated appeals pending Nos. 85-3704 and 85-3975 (9th Cir.); *Payne* v. *Toan*, 626 F. Supp. 553 (W.D. Mo. 1985) (rejecting application of lump sum rule).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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MAY 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM L. LUKHARD, Commissioner of the Virginia Department of Social Services,

Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, and all others similarly situated,

Respondents.

BRIEF OF AMICI CURIAE THE STATES OF ILLINOIS, INDIANA, WEST VIRGINIA, GEORGIA, NORTH CAROLINA, SOUTH CAROLINA, AND THE COMMONWEALTH OF PENNSYLVANIA ON BEHALF OF THE PETITIONER

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QUESTION PRESENTED

Whether the receipt of a personal injury award qualifies as income under the Aid to Families with Dependent Children program's "lump sum rule," codified at 42 U.S.C. §602(a)(17), which Congress enacted to correct a disincentive against family budgeting and to retarget scarce public assistance resources.

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In The

Supreme Court of the United States

October Term, 1985

WILLIAM L. LUKHARD, Commissioner of the Virginia Department of Social Services,

Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, and all others similarly situated,

Respondents.

BRIEF OF AMICI CURIAE THE STATES OF ILLINOIS, INDIANA, WEST VIRGINIA, GEORGIA, NORTH CAROLINA, SOUTH CAROLINA, AND THE COMMONWEALTH OF PENNSYLVANIA ON BEHALF OF THE PETITIONER

The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania as *amici curiae* respectfully join in the Petition of William L. Lukhard, Commissioner of the Virginia Department of Social Services, in requesting that a writ of certiorari issue to review the judgment entered October 10, 1985, of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF INTEREST

The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania have a direct financial and public policy interest in the outcome of this case. Each *amici* has a "single state agency" designated to administer the State plans for Title IV of the Social Security Act, known as the Aid to Families with Dependent Children program. 42 U.S.C. §602(a)(3). Included within the operation of this program is the so-called "lump sum rule," whereby nonrecurring lump sum payments are treated as income for purposes of determining eligibility for assistance. 42 U.S.C. §602(a)(17).

Personal injury awards are treated as income under the lump sum rule in these states. This treatment is currently the subject of litigation. *See Davis v. Coler*, 601 F. Supp. 444 (N.D. Ill. 1984), *appeal pending*, No. 85-2481 (7th Cir. argued Feb. 21, 1986); *Watkins v. Blinzinger*, 610 F. Supp. 1443 (S.D. Ind. 1985), *appeal pending*, No. 85-2366 (7th Cir. argued Feb. 21, 1986); *Miller v. Lord*, No. 85-0500 (N.D. W. Va. preliminary injunction issued on behalf of named plaintiffs May 16, 1985); *Rochester v. Ledbetter*, No. CV 585-132 (S.D. Ga. preliminary injunction denied Jan. 8, 1986); *Finch v. Kirk*, No. 86-90-CIV-5 (E.D. N.C. removed Jan. 21, 1986).

In *Davis* and *Watkins*, the district courts held that the States' treatment of personal injury awards as lump sum income was proper. The Fourth Circuit ruling is in direct opposition to the district courts' decisions in Illinois and Indiana. It is clear that the States have a vital interest in distributing limited fiscal resources to those persons most needy. A holding in the Seventh Circuit similar to that of the Fourth Circuit would sabotage that interest. It is also clear that the States have a strong public policy interest in a uniform interpretation of the law.

REASONS FOR GRANTING THE WRIT

In passing the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub. L. No. 97-35, 95 Stat. 357, Congress enacted various amendments and cutbacks in federally funded programs. OBRA was intended to alter federal fiscal policies and to restrain federal spending "in order to wage an effective battle against the high inflation and unemployment which have plagued the national economy for many years." S. Rep. No. 139, 97th Cong., 1st Sess. 3, *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 398. One of the OBRA amendments, the so-called "lump sum rule," contained in section 2304 of OBRA, codified at 42 U.S.C. §602(a)(17), is the subject matter of this lawsuit and numerous other actions across the nation. The lump sum rule requires states to budget nonrecurring lump sum payments as income for purposes of determining eligibility under the Aid to Families with Dependent Children program ("AFDC"). 45 C.F.R. §233.20(a)(3)(ii)(D).

In regulating the application of the lump sum rule, the United States Department of Health and Human Services has consistently permitted the administering state agencies to include a personal injury award as lump sum income. The Fourth Circuit, however, held that "the lump sum rule may not be applied to personal injury awards to render AFDC recipients ineligible for benefits." *Reed v. Health and Human Services*, 774 F.2d 1270, 1275 (4th Cir. 1985), *petition for cert. filed sub nom. Lukhard v. Reed*, 54 U.S.L.W. 3565 (U.S. Feb. 11, 1986) (No. 85-1358).

Federal courts are not in agreement in their resolution of the issue of whether personal injury awards are subject to the lump sum rule. Several district courts, after

being fully briefed on all of the issues, have correctly decided that such awards are subject to the rule. The courts focused on the purpose of the rule, as expressed by its drafter, and on its legislative history, in the context of the AFDC program.

In *Davis v. Coler*, 601 F. Supp. 444 (N.D. Ill. 1984), *appeal pending*, No. 85-2481 (7th Cir. argued Feb. 21, 1986), the district court found that the purpose of the OBRA amendment to the lump sum rule and the deference to be afforded the Secretary of the United States Department of Health and Human Services' interpretation dictated that, as a matter of law, the state and federal defendant's position was correct. 601 F. Supp. at 452-53. In addition to the court in *Davis*, three other federal district courts have specifically addressed the issue and decided that personal injury awards are properly considered income under the lump sum rule. In *Jackson v. Guissinger*, 589 F. Supp. 1288 (W.D. La. 1984), plaintiff negotiated a $19,000.00 personal injury settlement. The court rejected the contention that the money received should be treated as a resource for purposes of determining eligibility.

In *Watkins v. Blinzinger*, 610 F. Supp. 1443 (S.D. Ind. 1985), *appeal pending*, No. 85-2366 (7th Cir. argued Feb. 21, 1986), the court also refused to treat personal injury awards as exempt from the lump sum rule. The *Watkins* court, like the court in *Davis*, was not led astray in defining "income" for purposes of the rule. Finally, the district court in *Betson v. Cohen*, 578 F. Supp. 154, 159 (E.D. Pa. 1983), *rev'd on other grounds sub nom. Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985), concluded that personal injury awards were not specifically excluded from treatment as income. The court also rejected plaintiffs' effort to exclude such awards based upon the Internal Revenue Code's specific exclusion.

Two Circuit Courts of Appeal, although not specifically addressing the issue raised here, have also treated personal injury awards as countable under the lump sum rule. The plaintiff in *Walker v. Adams*, 741 F.2d 116 (6th Cir. 1984), received an insurance settlement from an automobile accident. The court found that the applicable federal regulation, 45 C.F.R. §233.20(a)(3)(ii)(D), disqualified recipients "when they receive 'lump sum' payments such as an inheritance, disability benefits, an insurance settlement, or a court judgment." 741 F.2d at 119. The court reached this conclusion despite finding that:

> [t]he statute and regulation may indeed produce harsh results to many AFDC recipients (particularly, as in this case, where the lump sum payment would serve to compensate a prior loss).

Id. Similarly, the court in *Sweeney v. Murray*, 732 F.2d 1022 (1st Cir. 1984), recognized that the lump sum rule, 42 U.S.C. §602(a)(17):

> provides that when an AFDC family receives a payment of nonrecurring lump sum income (such as an inheritance, *a personal injury judgment or settlement*, or a workers' compensation award), the family becomes ineligible for AFDC for a prescribed period of time.

732 F.2d at 1024 (emphasis added).

The court in *Reed v. Health and Human Services*, 774 F.2d 1270 (4th Cir. 1985), was wrong when it looked to the Internal Revenue Code and the Food Stamp Act in its efforts to define "income." Simply because the same word is used in various statutes does not mean that its definition is static. The meaning ascribed to the term "income" in the Internal Revenue Code cannot be applied to the term "income" in the AFDC program.

At least one federal district court rejected the *Reed* court's approach and pointed out that the exclusion of personal injury awards as income under the Internal Revenue Code is expressly established by I.R.C. §104(a)(2). *Betson v. Cohen*, 578 F. Supp. 154, 159 (E.D. Pa. 1983), *rev'd on other grounds sub nom. Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985). The court stated:

> Were such a provision not made, such awards could be considered income under the Internal Revenue Code general provision of income, 26 U.S.C. §61(a). *See Roemer v. Commissioner of Internal Revenue*, 716 F.2d 693, 696 n. 2 (9th Cir. 1983) ("Since there is no tax basis in a person's health and other personal interests, money received as compensation for an injury to those interests might be considered a realized accession to wealth" absent the exclusion.) The plaintiffs' argument fails in light of these considerations.

578 F. Supp. at 159.

Thus, a monetary award for damages is income. The Internal Revenue Code, I.R.C. §104(a)(2), and the federal tax regulations, Treas. Reg. §1.104-1, only exclude personal injury awards from consideration as gross income subject to taxation. Neither provision expressly states that such awards are not income. The Internal Revenue Code merely defines that income which is *taxable* and that which is *nontaxable*.

The *Reed* court's approach illustrates the danger of using one statutory term, particularly a term used in a statute as complex as the Internal Revenue Code, to construe a similar term in another statute, the Social Security Act. The definition and application of income, gross income, exclusions from income and so on in the Internal Revenue Code are clearly terms of art, which have been

the subject of continuing legislative amendment and judicial scrutiny. The *Reed* court indiscriminately selected one particular term and pronounced, by analogy only, that its meaning has some greater relevance in determining the application of the term in another statute.

One demonstration of the danger of construing terms in the Internal Revenue Code with terms in the AFDC statute is found in section 102 of the Internal Revenue Code. I.R.C. §102. Section 102 excludes gifts or inheritances from gross income. Under the *Reed* court's analysis, an AFDC recipient could receive a sizable cash gift or inheritance and remain eligible for AFDC.

Finally, where both Congress and the Secretary of Health and Human Services adopt a particular meaning from another statute, they do so expressly. The treatment of the Earned Income Tax Credit provides an excellent example. The amendments to the AFDC program contained in OBRA, the same amendatory legislation which included the lump sum rule, provided that any Earned Income Tax Credit available to an AFDC family is to be factored into the calculation of the AFDC grant. In enacting the Earned Income Tax Credit amendment, Congress explicitly adopted terms and definitions of the Internal Revenue Code. Section 2305 of OBRA amended section 402(d)(1) of the Social Security Act and provided:

> For purposes of this part of [the AFDC statute], an individual's "income" shall also include, to the extent and under the circumstances prescribed by the Secretary, an amount (which shall be treated as earned income for purposes of this part) equal to the earned income advance amount (*under section 3507(a) of the Internal Revenue Code of 1954*), that is (or, upon the filing of an earned income eligibility certificate, would be) payable to such individual.

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §2305, 95 Stat. 845, *codified at* 42 U.S.C. §602(d)(1) (emphasis added).

The Secretary of Health and Human Services promulgated an implementing regulation regarding the Earned Income Tax Credit with an express reference to the Internal Revenue Code. The regulation provides that:

> [t]he State agency shall make the [Earned Income Tax Credit] determination based upon the requirements specified in the *Internal Revenue Code under* 26 U.S.C. §43 and 3507, *and under the corresponding regulations at* 26 C.F.R. §1.43-1, 1.43-2, 31.3507-1 and 31.3507-2, which establish eligibility criteria for receipt of earned income credit and advance payments of the credit.

47 Fed. Reg. 5676 (1982), *codified at* 45 C.F.R. §233.20(a)(6)(ix)(B)(1) (emphasis added).

The failure of Congress to adopt a definition of income from another statute in reference to lump sum payments underscores the flexibility it intended the Department of Health and Human Services and state agencies to have in considering what payments constitute lump sum income. The Fourth Circuit has ignored this flexibility and bound the Virginia agency to an interpretation contrary to the law. The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania contend that this anomaly should not be permitted.

CONCLUSION

For the foregoing reasons the States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1986

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OPAL MAE COOK, STELLA KING, AND ALL
OTHERS SIMILARLY SITUATED,
Respondents.

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PETITION FOR CERTIORARI FILED FEBRUARY 11, 1986
CERTIORARI GRANTED JUNE 23, 1986

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The following have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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02-04-85	Motion of Patty Stanley, Barbara Webb and Vivian Latney for Relief from Stay Pending Appeal, Along with Accompanying Memorandum in Support of Motion.
02-04-85	Motion of Patty Stanley, Barbara Webb and Vivian Latney to Expedite the Cause.
02-12-84	Briefing Order.
02-12-85	Response of Commonwealth Defendant to Above Motions of Stanley, *et al.*

02-19-85	Order Denying Motion for Relief from Stay Pending Appeal and Granting Motion for an an Expedited Appeal.
02-19-85	Order Rescinding Briefing Order of 2-12-85 and Expediting Briefing Schedule.
10-24-85	Petition for Rehearing and Suggestion for Rehearing *en banc* of Commissioner Lukhard.
11-14-85	Order Denying Appellant/Cross Appellee Lukhard's Petition for Rehearing and Suggestion for Rehearing *en banc*.
11-18-85	Motion to Stay the Mandate.
11-21-85	Order Granting Motion to Stay Mandate Pending Application for Writ of Certiorari.
11-27-85	Motion of Appellees to Vacate or Modify the Stay of the Mandate.
12-13-85	Order Denying Appellees' Motion to Vacate or Modify the Stay of Mandate.
12-30-85	Motion of Appellees to Issue Mandate.
01-03-86	Order Denying Motion to Issue Mandate.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

Civil Action No. 83-0493

REED, *et al.*,	)	
	)	
Plaintiffs	)	
	)	
v.	)	COMPLAINT
	)	
LUKHARD, *et al.*,	)	
	)	
Defendants.	)	

I. PRELIMINARY STATEMENT

Plaintiffs bring this action as a challenge to certain state and federal regulatory provisions relating to the defendants' administration of the Aid to Dependent Children Program (hereinafter "ADC"). The challenged regulations provide that when an ADC recipient receives non-recurring "lump-sum" income, a period of automatic ineligibility is imposed during which ADC benefits are denied to the entire family. The set period of ineligibility continues without regard to the fact that the "lump-sum" may be exhausted leaving the family in desperate need of ADC benefits to meet the basic costs of survival. Plaintiffs challenge these rules as being inconsistent with the controlling and plainly worded provisions of the Social Security Act, which limit the application of such a "lump-sum" disqualification to ADC recipients who have additional earned income. These rules also impermissibly classify personal injury awards as "income" rather than as "resources." Plaintiffs sue for injunctive and declaratory relief for themselves and all others similarly situated.

II. JURISDICTION

1. Jurisdiction over plaintiffs' claims against both defendants is conferred on this Court by 28 U.S.C. § 1331; jurisdiction over plaintiffs' claims against Defendant Lukhard is also conferred by 28 U.S.C. § 1343.

2. Plaintiffs' action for declaratory and injunctive relief is authorized by:

a. 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

b. 42 U.S.C. § 1983, which provides for actions to redress the deprivation of rights, privileges, and immunities secured by the Constitution and laws, by any person acting under color of state law;

c. 5 U.S.C. §§ 701-706, which provide for judicial review of federal agency actions which are inconsistent with controlling federal law.

III. PARTIES

3. Plaintiff Ona Mae Reed lives with her minor child at P.O. Box 203, Rosedale, Virginia, and is a resident and citizen of Virginia.

4. Plaintiff Sallie Long lives with her three minor children at 486 Jefferson Street, Danville, Virginia, and is a resident and citizen of Virginia.

5. Plaintiff Ruth Wilcher lives with her two minor children at 1308 Liberty Road, N.E., Roanoke, Virginia, and is a resident and citizen of Virginia.

6. Defendant William L. Lukhard is Commissioner of the Virginia Department of Welfare (hereinafter "Welfare") and, as such, is charged with the statewide supervision of the ADC Program in Virginia. He is responsible for the administration of the ADC Program and for adopting and implementing ADC policies, rules, and regulations which must comply with controlling federal law.

7. Defendant Margaret Heckler is Secretary of the Department of Health and Human Services (hereinafter "HHS") and, as such, is charged with the federal operation of the ADC Program.

She is responsible for the adoption and implementation of ADC policies, rules, and regulations at the federal level and for approval of ADC plans submitted by individual states as required by federal law.

IV. CLASS ACTION ALLEGATIONS

8. The named plaintiffs bring this action on behalf of themselves and all others similarly situated, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. They represent two classes consisting of:

***

> (2) all persons in Virginia whose ADC benefits have been, continue to be, or in the future will be denied, reduced, or terminated because of receipt by such persons, or by members of their families, of "lump-sum" resources derived from personal injury and other insurance settlements or awards, which lump-sums are treated under defendants' policies as "income" rather than "resources."

9. The classes referred to in Paragraph 8, above, are so numerous that joinder of all members is impracticable. At least 400 cases have been closed or ADC denied because of the lump-sum rule since October, 1981, and the classes increase in size on a daily basis. There are questions of law and fact common to each class member. Questions of law common to the first class include whether defendants' regulations unlawfully extend the application of provisions of 42 U.S.C. § 402(a)(17) to persons not subject to the provisions of that section, in violation of 42 U.S.C. §§ 602(a)(7) and 602(a)(10). All members of the second class defined in paragraph 8, above, are directly affected by defendants' treatment of proceeds from personal injury and other insurance settlements as "income" rather than "resources" in violation of controlling federal law; as such, all members of the class share in common the same questions of law and fact with respect to the policies of the defendants in implementing the federal law. The claims plaintiffs bring are typical of the claims of each class member, and they will fairly and adequately protect the interests of the class. Defendants have acted or failed to act on grounds

generally applicable to each class member, thereby making appropriate final declaratory and injunctive relief with respect to each class member, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.

V. STATUTORY FRAMEWORK

10. (a) Virginia participates in the ADC Program established by Congress "[f]or the purpose of encouraging the care of dependent children in their homes or in the homes of relatives by enabling each state to furnish financial assistance...to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life..." Title IV-A of the Social Security Act, 42 U.S.C. § 601.

(b) As a result of its participation, Virginia must furnish ADC benefits to all eligible Virginia applicants or recipients and must do so with reasonable promptness. 42 U.S.C. § 602(a)(10).

11. Federal law and regulations provide that, in determining need and the amount of ADC assistance the state will provide, the state must take into account and consider, separately, the income and resources available to the ADC family. 42 U.S.C. § 602(a)(7); 45 C.F.R. § 233.20(a)(3)(ii)(D).

12. When an ADC family with earned income receives nonrecurring "lump-sum" income, federal statutes and regulations provide that the income is considered available to meet current and future needs of the family for a specified period of time, regardless of whether the income is exhausted prior to the expiration of that time. 42 U.S.C. § 602(a)(17); 45 C.F.R. § 233.20(a)(3)(ii)(D).

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14. When a family is in possession of resources, the family is eligible or ineligible for ADC, with respect to such resources, depending on whether the resources are exempt or non-exempt and depending on whether the value of non-exempt resources exceeds certain specified limits. 42 U.S.C. § 602(a)(7); 45 C.F.R. § 233.20(a)(3)(i).

15. Defendant Lukhard has promulgated rules and regulations in Virginia's ADC Program which result in treatment of the proceeds of insurance settlements as "lump-sum" income to such

recipients rather than resources in violation of federal law. The Virginia lump sum rules and regulations, published at ADC Manual § 305.4.C. pp. 11-11d, are attached hereto as Exhibit 1 and incorporated by reference herein.

VI. FACTS RELEVANT TO THE NAMED PLAINTIFFS

A. FACTS RELEVANT TO PLAINTIFF ONA MAE REED

16. Plaintiff Ona Mae Reed and her two minor children, age 15 and 10, were receiving ADC benefits of $233.00 per month in June, 1982. She and her family were not in receipt of earned income or any income other than her ADC benefits.

17. On or about June 16, 1982 Plaintiff Reed received a worker's compensation lump-sum settlement in the amount of $5,400.00, after the payment of $600.00 in attorney's fees. This settlement was for injuries suffered by Plaintiff Reed in a fall at her job on July 31, 1980. This accident resulted in blood clots in her leg which required an initial hospitalization of 19 days, and a subsequent hospitalization in January, 1982, when a second blood clot developed.

18. Plaintiff Reed promptly reported the worker's compensation settlement to the local Welfare Agency, Russell County Department of Social Services.

19. In July, 1982, Plaintiff Reed received notice, dated July 9, 1982, that under Defendants' lump-sum policies she and her two minor children were found ineligible for ADC and a period of ineligibility extending 20 months through March, 1984, was established.

20. Prior to receiving said notice of the 20 month ineligibility period, Plaintiff Reed had almost completely expended the proceeds from her worker's compensation settlement referred to in paragraph 17 above. Substantial portions were spent on the purchase of needed items such as the basic living expenses of shelter, food, and clothing for plaintiff and her children. Approximately $2,700.00 of the money was spent on a used car and on automobile insurance, taxes, and related expenses. Some of the money was spent to purchase used household appliances including a used washing machine, refrigerator, and vacuum

cleaner. Part of the money was also spent on the repayment of outstanding loans and bills, including $500.00 owed in attorney's fees for Plaintiff Reed's divorce. By August, 1982 the entire worker's compensation settlement had been exhausted.

21. In July or August, 1982, Plaintiff Reed attempted to work as a waitress, but was forced to stop after only three weeks, due to problems with her leg which had been injured in the July, 1980, accident.

22. From August 1982, when Plaintiff Reed's health forced her to stop waitressing, through March, 1983, she and her two children have had no means of support except as described in paragraph 25 below.

23. Plaintiff Reed suffers from asthma, bronchitis, blood clots in her leg, high blood pressure, ulcers and a nervous disorder, which require treatment with prescription medications, but Plaintiff Reed has had no funds with which to purchase these medicines since ADC and Medicaid were terminated in July, 1982.

24. Between August, 1982, and March, 1983, the sole means of support for Plaintiff Reed and her minor children consisted of $199.00 in Food Stamps, $175.00 in rental assistance, $57.00 in utility allowance from rental assistance, $336.00 in fuel assistance during the winter of 1982-1983, and $11.25 per week in child support from the father of her infant daughter, Janice Kay Morgan. Plaintiff Reed has never received child support from the father of her infant daughter, Billie Christine Reed, because the father deserted prior to Billie's birth and his whereabouts remain unknown.

25. Plaintiff Reed's infant daughter Janice did not return to school in September, 1982, because Plaintiff Reed could not afford to buy her the things she needed to return to school. On March 15, 1983, plaintiff's daughter Janice married and moved out of her mother's home.

26. Although Plaintiff Reed's Food Stamp allotment and rental assistance generally covers the purchase of food and pays for the rent, her utility allowance of $57.00 is insufficient to cover the monthly electric bill, including costs of electric heating, which averages between $85.00 and $95.00 per month. On March 31, 1983, Plaintiff Reed received a disconnect notice from

Appalachian Power Company based upon an overdue bill of $184.00. Using her entire utility allowance and money borrowed from her parents, Plaintiff Reed was able to avoid the power cutoff; however, $107.00 of this bill remains overdue, and Plaintiff Reed may be unable to make sufficient payment next time to prevent a cutoff.

27. Starting in April, 1983, the sole means of support available to Plaintiff Reed and the infant daughter who continues to live with her has been $139.00 in Food Stamps, $175.00 in rental assistance, and $57.00 in a utility allowance from rental assistance.

28. Plaintiff Reed has no money with which to purchase non-food items such as soap, detergent and toilet articles. She and her child need clothing which they cannot afford to buy.

Although Plaintiff Reed needs to see a doctor more frequently, she has not been able to afford to see a doctor since December, 1982. Without the ability to pay the automobile insurance due in May, 1983, and the ability to purchase the automobile sticker due since March, 1983, Plaintiff Reed faces loss of her ability to drive which is her only source of transportation.

29. As of March, 1983, Plaintiff Reed and her minor child met all lawful federal and state criteria for eligibility for ADC benefits in Virginia and would be receiving ADC benefits but for defendants' challenged lump-sum rule.

B. FACTS RELEVANT TO PLAINTIFF SALLIE LONG

30. Plaintiff Sallie Long, her husband, James E. Long, and three minor children, age 16, 14, and 9, were receiving ADC benefits in April, 1982. Plaintiff and her family were not in receipt of earned income or any income other than her ADC benefits, except as described in paragraph 45, below.

31. On or about April 20, 1982, Mr. Long received an insurance settlement in the amount of $10,245.95, after the payment of attorney's fees and medical bills. The settlement was for personal injuries Mr. Long had suffered in an automobile accident during April, 1981.

32. The insurance settlement was reported to the local Welfare Agency, Danville Bureau of Social Services.

33. Under Defendants' lump sum policies, Plaintiff Long, her husband, and their three minor children were found ineligible for ADC, their ADC case was closed June 1, 1982, and a period of ineligibility extending 27 months through October, 1984, was established.

34. Between April, 1982 and October, 1982, Mr. Long exhausted the proceeds of his insurance settlement referred to in paragraph 31 above. $4,000.00 of the money was spent on the downpayment to purchase a home with a purchase price of $16,000.00; some of the money was spent by Mr. Long to purchase a used car for $600.00, licenses, insurance coverage and gasoline. He also spent much of the money on basic living expenses such as food, clothing, shelter (rent and mortgage payments), utilities, and medical expenses. The entire insurance settlement has been spent at this time.

35. On or about October 6, 1982, Plaintiff and her children were deserted by Mr. Long, leaving them without means to provide for the necessities of life.

36. Since being deserted by her husband, Plaintiff Long and her three children have had no means of support except as described in paragraph 45 below. She has looked for work, but due to the present economic conditions and her lack of skills and transportation she has been unable to find a job.

37. The Danville Juvenile and Domestic Relations District Court has ordered Mr. Long to pay $25.00 a week child support and $25.00 a week spousal support. A copy of this order is attached hereto as Exhibit 2, and incorporated herein by reference. To date, Plaintiff Long has not begun receiving payments as Mr. Long is out of work.

38. Plaintiff Long applied for emergency assistance at the Danville Bureau of Social Services on November 24, 1982. At that time she owed $576.48 plus late charges on the mortgage of her home. Her utilities were disconnected after her husband left in October, 1982. The cost of reconnection would have been $335.99. She was denied emergency assistance because the local agency's plan only provides for a one time payment for shelter not to exceed $250.00.

39. Because she was without income, Plaintiff Long reapplied for ADC benefits on November 24, 1982. She was denied because

she was "still in a period of ineligibility due to lump sum payment received on April 20, 1982 of $10,345.95 paid to James Edward Long...." See local agency's decision attached hereto as Exhibit 3 and incorporated by reference herein.

40. On December 6, 1982, Plaintiff Long filed a timely appeal from the local agency's denial of ADC and General Relief.

41. On January 12, 1983, Defendant Lukhard's hearing officer held a fair hearing on Plaintiff Long's appeal and received a summary of the case from the local agency, attached hereto as Exhibit 4 and incorporated by reference herein.

42. On January 24, 1983, Defendant Lukhard's hearing officer issued a fair hearing decision which affirmed the local agency's decision, attached hereto as Exhibit 5 and incorporated by reference herein.

43. On February 1, 1983, Plaintiff Long, by counsel, filed a further timely appeal from the hearing officer's decision to the Defendant Lukhard's State Board, receipt of said appeal was acknowledged for State Board review on February 22, 1983, but the State Board has failed to date to take any timely action on said appeal in contravention of federal administrative promptness regulations set forth at 45 C.F.R. § 205.10(a)(16).

44. Plaintiff Long and her children went from October, 1982, to January, 1983, without utility service such as electricity, gas, and water. Finally, in January, 1983, local churches heard of her plight and paid her past due mortgage payments and had her utilities reconnected.

45. Plaintiff Long is currently receiving $200.00 per month from two tenants who rent rooms in her home. This money is used to pay the utility bill and the mortgage payment, but it is never enough to pay the bills in full. Plaintiff Long has had to cancel her life insurance policies, and her children are going without school supplies, needed shoes, and clothing. She walks everywhere she goes because she has no money for transportation.

46. Although Plaintiff Long receives approximately $237.50 per month in food stamp benefits, she is unable to purchase non-food items such as soap, detergent and toilet articles and has been dependent upon charity for her survival.

47. As of March, 1983, Plaintiff Long and her children met all lawful federal and state criteria for eligibility for ADC benefits in

Virginia and would be receiving ADC benefits but for defendants' challenged lump-sum rule.

C. FACTS RELEVANT TO PLAINTIFF RUTH WILCHER

48. Plaintiff Ruth Wilcher and her two minor children, age 16 and 9, were receiving ADC benefits of $255.00 per month in October, 1982. She and her family were not in receipt of earned income or any income other than her ADC benefits.

49. Prior to October, 1982, Diane Marie Terry, the infant daughter of Plaintiff Wilcher, was injured in an automobile accident. As a result of this accident, a personal injury claim was brought on her behalf, and on or about October 5, 1982, this claim was settled for $15,000.00, and the settlement was approved by the court. Pursuant to the court's order Miss Terry's attorney was paid $5,000.00 from the proceeds for attorney's fees; $9,300.00 was deposited by the clerk of court in a trust account, subject to court control, for the benefit of Diane Marie Terry; and $700.00 was turned over to Plaintiff Wilcher to be spent on immediate needs of Diane Marie Terry. A copy of the court's order is attached hereto as Exhibit 6.

50. Plaintiff Wilcher used approximately $520.00 to replace her daughter's bedroom furniture which had been through two fires and which was in very poor condition; she used the remainder of the $700.00 for clothes for her daughter.

51. Because of the Defendant's lump sum policies, the Roanoke City Department of Welfare notified Plaintiff Wilcher in November, 1982, that they were proposing to terminate the grant to her and her two children because of the $700.00 payment from the settlement of one child's personal injury claim, Plaintiff Wilcher appealed this proposed action, and her $225.00 per month benefits were continued pending the decision on appeal. She also inquired of the court concerning the meaning of the settlement approved for her daughter. A copy of the court's response is attached hereto as Exhibit 7.

52. After a December 14, 1982 hearing, Defendant Lukhard's hearing officer issued a decision upholding the termination decision of the local agency and approving their determination that Plaintiff Wilcher's family would be ineligible for any benefits for two months and eligible for only partial benefits in the third

month. A copy of the hearing officer's decision is attached hereto as Exhibit 8. Accordingly the local agency decided that the December payment made pending the appeal was an improper payment which would have to be recouped; that Plaintiff Wilcher would be ineligible for any benefits for herself or her children during January; and that she would receive only a partial ADC payment during February.

53. During January, Plaintiff Wilcher and her family had no income and had to rely upon friends and family to pay essential bills such as rent and upon food stamps for some of their needed food. During February, the family received ADC benefits of $121.00 and again had to rely on friends and relatives and on food stamps to meet their essential expenses. Plaintiff Wilcher and her two children are now receiving $229.50 per month in ADC benefits, a figure the local agency arrived at by subtracting from the $255.00 grant the $25.50 recoupment for the alleged overpayment in December, 1982.

54. Plaintiff Wilcher and her family will continue to receive reduced benefits for approximately 10 months until the full $255.00 December payment has been recouped; the reduction is caused by the Defendants' application of their improper lump sum rules; and Mrs. Wilcher will be unable to recover what has been and continues to be wrongfully withheld.

VII. INJUNCTIVE RELIEF CONSIDERATIONS

55. Plaintiff Reed has completely exhausted her resources and has no resources or income with which to meet the costs of the basic necessities of life. The food stamp benefits and rental assistance with utility allowance which Plaintiff Reed receives do not adequately meet the costs of even the basic necessities of life for plaintiff and her minor child. Plaintiff is at risk of having her utilities terminated for inability to pay her electricity bill, which includes electric heat for her house. Plaintiff requires prescription medications and physician's care for her asthma, bronchitis, blood clots, high blood pressure, ulcers, and nervous condition, but she has been unable to afford to see a doctor at all since December, 1982. Plaintiff Reed has been unable to obtain any of her prescription medications since July, 1982, when ADC and Medicaid were terminated, except for one bottle of breathing medicine bought by her sister in February, 1983, which is now

gone. Moreover, Plaintiff Reed and her minor child are without money with which to pay for basics, such as clothing, necessary transportation, food or incidentals not covered by plaintiff's food stamp benefits. Plaintiff Reed is experiencing irreparable harm and by virtue of her lack of access to medical attention she is at risk of futher and much more substantial and irreparable harm if the injunctive relief she seeks is not granted.

56. Plaintiff Long and her estranged husband have exhausted the proceeds of the insurance settlement except for the equity in the jointly owned home and the car owned by Mr. Long mentioned in paragraph 35 above. Plaintiff Long's limited income from boarders is insufficient to meet the costs of even the basic necessities of life for plaintiff and her three minor children. Plaintiff will soon be subject to foreclosure for non-payment of her mortgage and to termination of all utilities. Moreover, plaintiff is without money with which to pay for basics, such as clothing, necessary transportation, food or incidentals not covered by plaintiff's food stamp benefits. Plaintiff Long and her three minor children will experience irreparable harm if the injunctive relief is not granted.

57. Plaintiff Wilcher presently receives, and for approximately the next 10 months will continue to receive, reduced ADC benefits which are not adequate to meet the costs of even the basic necessities of life for Plaintiff Wilcher and her two minor children. The reduction in ADC benefits reflects the agency's monthly recoupment for the overpayment which allegedly resulted from the application of the lump-sum rule. Plaintiff Wilcher and her two minor children are without money with which to pay for basics, such as clothing, necessary transportation, food or incidentals not covered by plaintiff's food stamp benefits or reduced ADC benefits. Plaintiff Wilcher and her two minor children will experience irreparable harm if the injunctive relief is not granted.

58. The harm to plaintiffs and their proposed class, if injunctive relief is not granted, far outweighs the harm to defendants if injunctive relief is granted.

59. Plaintiffs and their proposed class have a likelihood of success on the merits so as to justify injunctive relief by this Court.

60. Plaintiffs and their proposed class have no adequate remedy at law.

VIII. CLAIMS FOR RELIEF

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SECOND CLAIM FOR RELIEF — STATE DEFENDANT

65. Plaintiff realleges and incorporates by reference paragraphs 1-60, above.

66. Defendant Lukhard's policy of counting the money received from a personal injury settlement as income rather than a resource violates the requirements of 42 U.S.C. §§ 602(a)(7), 602(a)(10), and 602(a)(17).

WHEREFORE, Plaintiffs prays that this Court:

1. Assume jurisdiction over this matter.

2. Certify this action as a class action, pursuant to Rule 23 of the Federal Rules of Civil Procedure, on behalf of the classes defined at paragraph 8, above.

3. Declare the defendants' policies challenged herein to be violative of plaintiffs' rights under 42 U.S.C. §§ 602(a)(7), 602(a)(10) and 602(a)(17).

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5. Preliminarily and premanently enjoin Defendant Lukhard from applying the "lump-sum" provision of ADC Manual § 305.4C and/or 45 C.F.R. § 233.20(a)(3)(ii)(D) to persons who did or will receive proceeds of insurance settlements for personal injury.

6. Order Defendant Lukhard to identify and notify each former or present applicant for or recipient of ADC who have been denied ADC benefits or had ADC benefits terminated under the provisions of Virginia's ADC Manual, § 305.4C, pp. 11-11d, that his/her eligibility for past or current benefits may have been incorrectly determined, and that he/she may now reapply for present and future ADC benefits and seek retroactive payment for benefits which may have been wrongfully denied.

7. Grant such other and further relief as this Court may deem just and proper, including the award of attorneys' fees for the successful prosecution of this action under 28 U.S.C. § 2412 and 42 U.S.C. § 1988.

ONA MAE REED, SALLIE LONG,
RUTH WILCHER, *et al.*

— By Counsel —

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(Certificate Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

(Virginia's ADC Regulation § 303.5, dated 7/81 from Plaintiffs' Brief in Support of Preliminary Injunction.)

303.3-303.5
ADC MANUAL 7/81 Page 2

303.5 LIQUIDATION OF ASSETS —

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Any cash received by a recipient in a lump sum, from real and personal property, such as an insurance settlement, or sale of real estate is not recurring income and must be counted in relation to the $600 allowable reserve, as soon as administratively possible, but no later than the second month following the month in which the lump sum was received* to avoid error in eligibility and/or the amount of the money payment.

If the caretaker elects to exclude a child from the assistance unit (see Section 302.6), any resources designated for that child, are disregarded in determining eligibility for the remaining child(ren) and caretaker. Resources which might be designated for a child could include trust funds, insurance settlements, lump sum social security payments, accumulation of child's own earned income or an accumulation of funds from any source of designated income. Such resources must be in a separate identifiable account established in the name of the child. The receipt of funds from all of the above *except* trust funds will be considered as a change in circumstances on the day it is received if it is designated for a non-excluded child. (See Section 303.3 and 303.5.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Exhibit E to Plaintiffs' Brief in Support of Preliminary Injunction (Senate Finance Committee Report #97-0139, 97th Cong., 1st Sess. (1981)).

LEGISLATIVE HISTORY
P.L. 97-35
[page 436]

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Count lump-sum payments. — Under present law, any payments that meet the definition of income (*e.g.*, retroactive social security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered a resource in the months thereafter.

The committee amendment would require that large payments, together with other income remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program. If such income exceeds the standard of need, the household would be ineligible for aid. Any amount of the income that exceeds the monthly needs standard would be divided by the monthly needs standard, and the household would be ineligible for aid for the number of months resulting from that calculation. Any remaining amount would be counted as income in the first month following the period of ineligibility.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Exhibit L to Plaintiffs' Brief in Support of Preliminary Injunction (Virginia's ADC Regulation on Exempt Resources).

NEED AND AMOUNT OF ASSISTANCE	ADC MANUAL	CHAPTER 300
PROVISIONS REGARDING PROPERTY	1/83	303.1-303.3

303.3 PROPERTY IN EXCESS OF ALLOWABLE RESERVES — When an otherwise eligible child and his parent(s) living in the home have cash and/or liquid assets, other than the reserved items listed above, totaling more than $600, the resource must be examined to determine ownership and unless designated as a resource to one of the eligible children, eligibility will not exist (see Section 302.6).

All loans, except those obtained for current living expenses, will be considered an available resource. Current living expenses shall include items such as the cost of food, clothing, shelter and other day to day living expenses for the current month in which the loan was received. For example, a loan obtained to buy a car is considered a resource. A loan received to pay current rent is considered income. See 305.4C. 05.4C.

When any of the reserved items listed in 303.2 above OR ANY OTHER REAL OR PERSONAL PROPERTY OWNED BY AN INDIVIDUAL WHOSE RESOURCES ARE CONSIDERED IN DETERMINING ELIGIBILITY ARE SOLD OR transferred into cash or other liquidable assets, these items are resources and will be considered in relation to the allowable reserve.

Example #1:

Ms. C sells her exempted vehicle and receives $500 from the sale. The agency will consider this sum of money in relation to the allowable reserve.

Example #2

Ms. H loses her exempted home as a result of a fire. She receives an insurance settlement in the amount of $20,000. This money is a resource and will be considered in relation to the allowable reserve.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Exhibit M to Plaintiffs' Brief in Support of Preliminary Injunction (Notice from Defendant Lukhard Regarding Supplement #1 to ADC Transmittal #82).

December 27, 1982

AID TO DEPENDENT CHILDREN

Supplement 1 to
ADC Transmittal #82

The attached material consists of revisions to the ADC Manual as a result of a recent court decision in the following areas:

A. Section 303.3 has been revised to reflect that when any resource is sold or converted to cash, the proceeds are to be considered as a resource.

B. Section 305.4 has been revised to reflect that the proceeds derived from the sale or conversion of real or personal property are not considered a lump sum. For example, when an insurance policy owned by the assistance unit is cashed in or pays off, the money received will not be considered a lump sum.

The attached material is effective January 1, 1983 and is to be incorporated into the ADC Manual as follows:

Section 303.1-303.3, page 1, dated 1/83 (1 sheet) to replace Section 303.1-303.3, page 1, dated 7/82 (1 sheet).

Section 305.4, page 11, dated 1/83 (1 sheet) to replace Section 305.4, page 11, dated 7/82 (1 sheet).

/s/
William L. Lukhard

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

ANSWER OF THE STATE DEFENDANT

Comes now the State Defendant, William L. Lukhard, individually and in his official capacity as Commissioner of the Virginia Department of Social Services, and for his response to the complaint filed herein states as follows:

FIRST DEFENSE

1. The State Defendant admits the allegations contained in paragraphs 1 and 2 of the complaint.

2. The State Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 3, 4, and 5 of the complaint.

3. The State Defendant admits only that he is the Commissioner of the Virginia Department of Social Services and that as the chief administrator he is responsible for statewide supervision of the ADC program; and denies each and every other allegation in paragraph 6 of the complaint.

4. The State Defendant admits the allegations contained in paragraph 7 of the complaint.

5. The State Defendant denies the allegations contained in paragraphs 8 and 9 of the complaint.

6. The State Defendant admits the allegations contained in paragraphs 10 and 11 of the complaint.

7. The State Defendant admits only that nonrecurring lump-sum income is considered to meet current and future needs of the ADC family for a specified period of time; and denies each and every other allegation contained in paragraph 12 of the complaint. Furthermore, the regulation speaks for itself.

8. The State Defendant admits only that the lump-sum policy extends to all ADC recipients without regard to receipt of earned income; and denies the allegation that the lump-sum policy was accurately stated in paragraph 12 as alleged in paragraph 13 of the complaint. Furthermore, the regulation speaks for itself.

9. The State Defendant admits the allegations contained in paragraph 14 of the complaint.

10. The State Defendant denies the allegations contained in paragraph 15 of the complaint.

11. The State Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 16 and 17 of the complaint.

12. The State Defendant denies the allegations contained in paragraph 18 of the complaint.

13. The State Defendant admits the allegations contained in paragraph 19 of the complaint.

14. The State Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and 31 of the complaint.

15. The State Defendant admits the allegations contained in paragraphs 32 and 33 of the complaint.

16. The State Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 34, 35, 36, and 37 of the complaint.

17. The State Defendant admits that Plaintiff Long applied for emergency assistance at the Danville Bureau of Social Services on November 24, 1982; and alleges that he is without knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in paragraph 38 of the complaint.

18. The State Defendant admits the allegations contained in paragraphs 39, 40, 41, and 42 of the complaint.

19. The State Defendant admits that Plaintiff Long filed a timely appeal to the State Board and that such appeal was acknowledged; and denies each and every other allegation contained in paragraph 43 of the complaint.

20. The State Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 44, 45, 46, 47, 48, 49, and 50 of the complaint.

21. The State Defendant admits that the Roanoke City Department of Welfare notified Plaintiff Wilcher of their proposed termination action, that Plaintiff Wilcher appealed the proposed action and that her benefits were continued pending the appeal; and is without knowledge or information to form a belief as to the truth of each and every other allegation contained in paragraph 51 of the complaint.

22. The State Defendant admits the allegations in paragraph 52 of the complaint.

23. The State Defendant is without knowledge or information to form a belief as to the truth of the allegations contained in paragraph 53 of the complaint.

24. The State Defendant admits that Plaintiff Wilcher will receive reduced benefits for approximately ten months; and denies each and every other allegation contained in paragraph 54 of the complaint.

25. The State Defendant denies the allegations contained in paragraphs 55, 56, 57, 58, 59, 60, 62, 64, 65, and 66 of the complaint.

26. The allegations contained in paragraphs 61 and 63 are not such as require an answer pursuant to the Federal Rules of Civil Procedure, but to the extent that they may be deemed to require such answer, the State Defendant denies the allegations contained therein.

SECOND DEFENSE

The State Defendant has at all times relevant to this complaint acted in good faith.

THIRD DEFENSE

The State Defendant has at all times relevant to this complaint

acted in a ministerial capacity to the federal defendant and is obligated to comply with the relevant federal statutes, regulations and interpretations thereof that are issued by the federal defendant.

WHEREFORE, the State Defendant, having fully answered, prays this Court dismiss this action against him, award it costs and attorney's fees herein expended and grant such further relief as the Court may deem appropriate.

Respectfully submitted,

WILLIAM L. LUKHARD, COMMISSIONER
VIRGINIA DEPARTMENT OF SOCIAL
SERVICES

BY: /S/

Counsel

Gerald L. Baliles
Attorney General

John A. Rupp
Senior Assistant Attorney General

Cheryl A. Wilkerson
Intern

101 North Eighth Street
Richmond, Virginia 23219
(804) 786-1021

(Certificate Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

ANSWER OF FEDERAL DEFENDANT

COMES NOW the Federal Defendant, MARGARET M. HECKLER as Secretary of the Department of Health and Human Services, and responds to the Complaint filed herein as follows:

1. Paragraphs 1 and 2 are admitted.

2. Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations of paragraphs 3, 4, and 5.

3. Answering paragraph 6, it is admitted that Defendant William L. Lukhard is Commissioner of the Virginia Department of Social Services and believed that Defendant Lukhard, in his official capacity as Commissioner, is responsible for administration of Virginia's ADC program. The Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the other allegations contained in paragraph 6.

4. Answering paragraph 7, the Federal Defendant admits that Defendant Margaret M. Heckler is Secretary of the United States Department of Health and Human Services and that as such is charged with administering the Aid to Families with Dependent Children (AFDC) program pursuant to the provisions of 42 U.S.C. Section 601 *et seq.* Each and every other allegation of paragraph 7 is denied.

5. Answering paragraph 8, it is admitted that the named plaintiffs are bringing this action on behalf of themselves, but the Federal Defendant denies each and every other allegation of paragraph 8.

6. The allegations of paragraph 9 are denied.

7. Paragraphs 10 and 11 are admitted.

8. Answering paragraph 12, Federal Defendant admits that pursuant to Federal statute and implementing regulation nonrecurring lump sum income is deemed available to meet present and future needs of AFDC families in lieu of AFDC benefits; it is specifically denied that this "lump sum rule" applies only to AFDC families with earned income.

9. Answering paragraph 13, the Federal Defendant denies it has extended by regulation the provisions of Section 602(a)(17) or any other statute. Each and every other allegation of paragraph 13 is denied.

10. Paragraph 14 is admitted.

11. The allegations of paragraph 15 are denied.

12. Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations of paragraphs 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32.

13. Answering paragraph 33, the Federal Defendant admits only that pursuant to the "lump sum rule," 42 U.S.C. Section 602(a)(17), a period of ineligibility for AFDC benefits would be established for any AFDC family that received a nonrecurring lump sum that together with other countable income exceeded the State's monthly standard of need, which fixed period of ineligibility would be derived by dividing the total countable income in the month of receipt by the monthly need standard applicable to such family in that State.

14. Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations of paragraphs 34, 35, 36, 37, and 38.

15. Answering paragraph 39, Federal Defendant references and incorporates its statement contained in paragraph 13 of its Answer; the Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the remainder of paragraph 39.

16. Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the allegations of paragraphs 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51.

17. Answering paragraph 52, the Federal Defendant admits only that States are required, pursuant to Federal AFDC

provisions, to recoup improper AFDC payments. The Federal Defendant references and incorporates its statement contained in paragraph 13 of its Answer, and is without sufficient information or knowledge to form a belief as to the truth of the remainder of paragraph 52.

18. Answering paragraph 53, the Federal Defendant admits only that States are required, pursuant to Federal AFDC provisions, to recoup improper AFDC payments; the Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the remainder of paragraph 53.

19. Answering paragraph 54, the Federal Defendant is without sufficient information or knowledge to form a belief as to whether Plaintiff Wilcher will receive reduced benefits and if so, for how long; the Federal Defendant denies each and every other allegation of paragraph 54.

20. Answering paragraph 55, the Federal Defendant denies any allegation that Plaintiff Reed is suffering irreparable, or any other, harm by reason of Federal Defendant's action; the Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the remainder of the allegations of paragraph 55.

21. Answering paragraph 56, the Federal Defendant denies any allegation that Plaintiff Long is suffering irreparable, or any other, harm by reason of Federal Defendant's actions; the Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the remainder of the allegations of paragraph 56.

22. Answering paragraph 57, the Federal Defendant denies any allegation that Plaintiff Long is suffering irreparable, or any other, harm by reason of Federal Defendant's actions. The Federal Defendant is without sufficient information or knowledge to form a belief as to the truth of the remainder of the allegations of paragraph 57.

23. Paragraph 58 is denied.

24. Paragraph 59 is denied.

25. Paragraph 60 is denied.

26. The allegations contained in paragraph 61 are not such as require an answer pursuant to the Federal Rules of Civil Procedure, but to the extent an answer may be required, the

Federal Defendant denies the allegations contained therein.

27. Paragraph 62 is denied.

28. The allegations contained in paragraph 63 are not such as require an answer pursuant to the Federal Rules of Civil Procedure, but to the extent an answer may be required, the Federal Defendant denies the allegations contained therein.

29. Paragraph 64 is denied.

30. The allegations contained in paragraph 65 are not such as require an answer pursuant to the Federal Rules of Civil Procedure, but to the extent an answer may be required, the Federal Defendant denies the allegations contained therein.

31. Paragraph 66 is denied.

WHEREFORE, Federal Defendant prays this Court will dismiss this action and award it attorneys' fees and costs expended herein and grant such further relief as the Court may deem appropriate.

Respectfully Submitted,

JOHN P. ALDERMAN
UNITED STATES ATTORNEY

/S/

E. MONTGOMERY TUCKER
ASSISTANT UNITED STATES ATTORNEY

(Certificate Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Defendant Lukhard's Answers to Plaintiffs' First Interrogatories.

DEFENDANT LUKHARD'S ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

COMES now the state defendant, William L. Lukhard, Commissioner, Virginia Department of Social Services, by and through department staff who have researched the issues involved in plaintiffs' first set of interrogatories and who respond as follows:

Interrogatory No. 1: State the number of AFDC Assistance Units which have been terminated from the AFDC program in Virginia since October 1, 1981, because of the lump sum policy contained in § 305.4C of the Virginia AFDC Manual.

> *Response No. 1:* The exact number of assistance units terminated from ADC since October 1, 1981, due to § 305.4C of the Virginia ADC Manual is not available. Because the Department's computer system is programmed only to know the present status of cases, it cannot identify any cases which were previously terminated due to receipt of a lump sum, but were later reopened once the disqualification period had ended. Also, cases in three localities (Richmond, Fairfax, and Portsmouth) are not yet on the Department's computer system. Thus, any of their cases terminated due to the relevant lump sum provision will not be reflected in the Department's information. In talking with the regional specialists, it has been determined that this information cannot be obtained from the computer systems operated by these three agencies. The best information available to the Department indicates that *669 cases have been terminated* from ADC since October 1, 1981 because of

the lump sum policy contained in § 305.4C of the Virginia ADC Manual.

Interrogatory No. 2: State the number of AFDC applications which have been denied in Virginia since October 1, 1981, because of the lump sum policy contained in § 305.4C of the Virginia AFDC Manual.

Response No. 2: The explanation given for Interrogatory No. 1 is applicable here as well. The best information available to the Department indicates that *100 cases have been denied ADC* since October 1, 1981, because of the lump sum policy contained in § 305.4C of the Virginia ADC Manual.

Interrogatory No. 3: For those identified in answers to Interrogatory 1 and 2, state the number of cases which did not have earned income in the month during which the lump sum was received.

Response No. 3: The explanation given for Interrogatory No. 1 is applicable here as well. Furthermore, the Department's computer does not reflect which cases had no income in the month during which the lump sum was received. Computer information does reflect that 96 of *the cases reflected in Response Nos. 1 and 2 did not have earned income in the month of closure or denial.*

Interrogatory No. 4: For those identified in answers to Interrogatory 1 and 2, state the number of cases whose lump sum was a payment, award or insurance settlement for personal injuries sustained by a member of the assistance unit.

Response No. 4: The information requested is *not available* to the Department. To retrieve it would require a manual search of ADC cases by all 124 local agencies of welfare/social services.

Interrogatory No. 5: For those identified in the answer to Interrogatory 3, state:

(a) the average length of the disqualification imposed by § 305.4C.

(b) the number of cases which received AFDC benefits after the disqualification period.

(c) the number of cases which did not receive AFDC benefits after the disqualification period.

(d) the number of cases which are currently within the disqualification period imposed by the Virginia Department of Social Services (DSS).

Response No. 5: See the response to Interrogatory No. 4.

Interrogatory No. 6: For those identified in the answer to Interrogatory 4, state:

(a) the average length of the disqualification imposed by § 305.4C.

(b) the number of cases which received AFDC benefits after the disqualification period.

(c) the number of cases which did not receive AFDC benefits after the disqualfication period.

(d) the number of cases which are currently within the disqualification period imposed by the Virginia Department of Social Services (DSS).

Response No. 6: See the response to Interrogatory No. 4.

Interrogatory No. 7: Identify and describe all regulations, policies, interpretations, instructions, documents or communications issued by DSS or the U.S. Department of Health and Human Services regarding the applicatin of the October 1, 1981 lump sum rule to personal injury payments, awards or insurance settlements received by AFDC assistance units or applicants.

Response No. 7: See the documents enclosed herein.

Interrogatory No. 8: State the name(s) and position(s) of the person(s) answering these interrogatories.

Response No. 8:

Mr. I. Guy Lusk, Director
Division of Benefit Programs
Virginia Department of Social Services

Ms. Joan W. Farmer
Human Resources DP User Liaison
Division of Benefit Programs
Virginia Department of Social Services

Ms. Constance O. Hall, Chief
Bureau of Economic & Medical Assistance
Division of Benefit Programs
Virginia Department of Social Services

Ms. Carolyn Ellis, Supervisor
Bureau of Economic & Medical Assistance
Division of Benefit Programs
Virginia Department of Social Services

Respectfully submitted,

WILLIAM L. LUKHARD, COMMISSIONER
VIRGINIA DEPARTMENT OF SOCIAL SERVICES

BY: /S/

Carolyn Ellis, Supervisor
Bureau of Economic & Medical Assistance
Division of Benefit Programs
Virginia Department of Social Services

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Defendant Heckler's Answers to Plaintiffs' First Interrogatories.

DEFENDANT HECKLER'S ANSWERS TO PLAINTIFFS' FIRST INTERROGATORIES

Interrogatory #1

Identify and describe all regulations, policies, interpretations, instructions, documents, or communications regarding the application of the AFDC lump sum rule (45 CFR 233.20(a)(3)(ii)(D), effective October 1, 1981) to personal injury payments, awards or insurance settlements received by AFDC applicants or recipients.

The following documents are provided in response to Interrogatory #1.

Exhibit A

Document:	Action Transmittal No. SSA-AT-81-35
Location:	Office of Family Assistance
Person in charge of Document:	Jo Anne B. Ross Acting Associate Commissioner for Family Assistance
Date of Document:	November 5, 1981
Author:	Office of Policy and Evaluation, Office of Family Assistance
Length:	10 pages
Synopsis:	Document was issued to all States and provided answers to questions posed by States regarding the Interim final regulation implementing OBRA changes.

Exhibit B

Document:	Final Rule 47 Fed. Reg. 5656, February 5, 1982.
Location:	Office of Family Assistance
Person in charge of Document:	Jo Anne B. Ross Acting Associate Commissioner for Family Assistance
Date of Document:	February 5, 1981
Author:	Office of Family Assistance
Length:	38 pages
Synopsis:	Excerpt of final Federal rules published to implement the Omnibus Budget Reconciliation Act (P.L. 97-35) changes in the Aid to Families with Dependent Children Program.

Exhibit C

Document:	Code of Federal Regulations
Location:	Office of Family Assistance
Person in charge of Document:	Jo Anne B. Ross Acting Associate Commissioner for Family Assistance
Date of Document:	October 1, 1982
Author:	Office of Family Assistance
Length:	249 pages
Synopsis:	Excerpt of Code of Federal regulations revising Part 45, Chapter II implementing the lump sum rule in AFDC.

Exhibit D

Document:	April 1982 Edition of the Social Secruity Act
Location:	Office of Family Assistance
Person in charge of Document:	Jo Anne B. Ross Acting Associate Commissioner for Family Assistance
Date of Document:	April 1982
Author:	Congress
Length:	819 pages plus Appendix
Synopsis:	Excerpt of Title IV-A of the Social Security Act as amended enacting the lump sum rule at 402(a)(17).

Exhibit E

Document:	Excerpt of Public Law 97-35 enacting section 2304 "Treatment of Income In Excess of the Standards of Need; Lump Sum Payments."
Location:	Office of Family Assistance
Person in charge of Document:	Jo Anne B. Ross Acting Associate Commissioner for Family Assistance
Date of Document:	August 13, 1981
Author:	Congress
Length:	200 pages
Synopsis:	Excerpt of OBRA statute signed into law on August 13, 1981 enacting the lump sum provision.

Exhibit F

Document:	Office of Public Inquiry Fact Sheet
Location:	Office of Family Assistance

Person in charge of Document:	Jo Anne B. Ross Acting Associate Commissioner for Family Assistance
Date of Document:	July 6, 1983
Author:	Office of Policy and Evaluation
Length:	1 page
Synopsis:	Fact Sheet developed by CFA in response to public inquiry from Congressman Bosco. Subject: Federal Lump Sum Policy — insurance settlement.

Exhibit G

Document:	Memorandum — Policy Clarification — Lump Sum — Information
Location:	Office of Family Assistance
Person in charge of Document:	Jo Anne B. Ross Acting Associate Commissioner for Family Assistance
Date of Document:	May 24, 1983
Author:	Office of Policy and Evaluation
Length:	3 pages
Synopsis:	Policy clarification in the form of questions and answers regarding computation of the period of ineligibility as a result of the application of the lump sum rule.

Interrogatory #2

Identify or attach all documents referred to in Paragraph 5 of the May 27, 1983 Affidavit of Jo Anne B. Ross, in which HHS proposed the lump sum rule to Congress. For each document so identified, in addition to the information requested in the introduction above, state the date and manner in which the document was transmitted or presented to Congress and the individuals, committees, legislators or staff to whom the transmittal or presentation was made.

The following documents are provided in response to plaintiffs' Interrogatory #2

Exhibit H

Excerpt of testimony presented by former Secretary Richard Schweiker before the Senate Committee on Finance dated March 17, 1981. Pages 17-18 specifically address the AFDC lump sum proposal. Exhibit H, located in the Office of Family Assistance, is 103 pages in length.

Exhibit I

Excerpt of prepared statement by Richard S. Schweiker, Former Secretary of Health and Human Services before the Committee on Finance, United State Senate, Tuesday, March 17, 1981. Pages 34-35 specifically address the AFDC lump sum proposal. Exhibit I, located in the Office of Family Assistance, is 64 pages in length.

Interrogatory #3

State the name(s) and position(s) of the person(s) answering these interrogatories.

Jo Anne B. Ross
Acting Associate Commissioner
for Family Assistance,
Social Security Administration.

(Certificate Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Exhibit F To Defendant Heckler's Answer to Plaintiffs' First Interrogatories (Office of Public Inquiry Fact Sheet — Federal Lump Sum Income Policy).

DEPARTMENT OF HEALTH AND HUMAN SERVICES

July 6, 1983

TO:	OPI, 4A5 Annex
FROM:	OFA
RE:	Letter from Congressman Douglas H. Bosco, 1st District, California, re suggestion of his constituent, James Harlow, to change the OBRA lump sum provision
SUBJECT:	Federal Lump Sum Income Policy

BACKGROUND

The Congressman's constituent, James Harlow, received a $400 automobile accident insurance settlement resulting in the reduction of his AFDC benefit. The constituent believes that a welfare recipient should be able to keep any insurance settlement received or if this isn't possible, that the welfare agency should be permitted to take a small amount from each monthly check to account for the lump sum, rather than taking the entire amount at once. He suggests a change in law.

FACTS NECESSARY FOR RESPONSE

The Aid to Families with Dependent Children program (AFDC) is a needs based program and the Social Security Act, under section 402(a)(7) of title IV-A requires that all income and resources must be taken into consideration in determining need

and the amount of payment a family is eligible for unless expressly disregarded by statute. The statute does not permit an insurance settlement to be disregarded.

The Omnibus Budget Reconciliation Act of 1981 (OBRA) amended title IV-A of the Social Security Act, under section 402(a)(17), to require States to consider lump sum income received by AFDC applicants or recipients as available for support not only in the month of receipt but also to meet future needs. Thus, if the lump sum income from the insurance settlement exceeds the standard of need in the month of receipt, the family would be ineligible in that month. In addition, any amount of the income that exceeds the initial month's need standard would be divided by the monthly needs standard, and the family would be ineligible for aid for the number of months resulting from that calculation. Federal policy under this provision does allow for the period of ineligibility to be shortened, if the money had to be spent in connection with a life threatening circumstance, as defined by the State.

In enacting this provision, Congress felt that nonrecurring lump sum payments should be considered available to meet the ongoing needs of an AFDC family and that the prior treatment of lump sum payments had the effect of encouraging the family to spend such income as quickly as possible in order to retain AFDC eligibility.

Current Federal policy does allow States to consider a non-recurring lump sum payment that is in the nature of a windfall, such as an insurance settlement, as a resource rather than income. However, we are carefully reviewing whether to continue this policy. (Our understanding is that California has *not* elected the option to treat a windfall payment as a resource.)

OBRA under section 402(a)(7)(B) of the Act sets a statutory limit of $1,000 or less on the equity value of the resource an assistance unit may have and be eligible for AFDC. For States considering insurance settlements as a resource, this provision would be applicable and the payment would be measured against the resource limit.

Regardless of whether a State chooses to consider the lump sum insurance settlement as income or as a resource, the State is permitted to disregard any portion of the settlement that was used for the purpose for which it was paid. For example, if the

settlement was to meet the cost of unpaid medical bills, the portion used for that purpose is not required to be counted as income or as a resource in determining the amount of the AFDC payment.

***

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Exhibit G to Defendant Heckler's Answers to Plaintiffs' First Interrogatories (Memorandum Policy Clarification — Lump Sum, May 24, 1982).

DEPARTMENT OF HEALTH EDUCATION
AND WELFARE

May 24, 1982

Gordon M. Sherman
Regional Commissioner, SSA
Region IV — Atlanta

Linda S. McMahon
Associate Commissioner
for Family Assistance

Policy Clarification — Lump Sum — INFORMATION

This responds to your memorandum of March 8, 1982 requesting policy clarification regarding lump-sum income (45 CFR 233.20(a)(3)(ii)(D)).

1. *Question:* "The (Florida) Department of Health and Rehabilitative Services is concerned over application of the term 'life-threatening' in developing State policy and rules. Further guidance beyond that provided in the preamble to the regulations is requested on the definition of this term and the circumstances it is intended to cover."

   Answer: There is no Federal definition of a life-threatening" for purposes of the AFDC program. States have the flexibility to define this term using reasonable

standards. Circumstances which States may wish to cover include medical emergencies, natural disasters (e.g., fire or flood), death of a parent, etc.

2a. *Question:* "Can the ineligibility period be eliminated entirely?"

Answer: Yes. Under very exceptional circumstances, there does not always have to be a period of ineligibility. The State must always "compute" a period of ineligibility. However, for example, if a life threatening circumstance occurs in the same month the lump sum is received and all of the money is expended in connection with it, the family will not be ineligible for assistance because of the lump sum provision.

2b. *Question:* "On what basis is the length (of the ineligibility period) determined once the decision has been made to shorten (that period)?"

Answer: Federal regulations permit a State to shorten the period of ineligibility only when (1) the State has determined that a life-threatening circumstance exists, (2) the family budgeted its lump sum money properly by using it to meet essential needs, e.g., the State standard of need for a family of that size, (3) the family currently has no other income or resources sufficient to meet the life-threatening circumstance, and (4) of the lump sum left, if any, the family has expended or will expend some or all of it in connection with the life-threatening circumstance. Therefore, if the criteria above are met, the basis for recomputing the period of ineligibility would be the family's remaining income after subtracting the amount spent on essential needs and the amount spent or obligated for the life-threatening circumstance from the total income in the month it received the lump sum. However, if the family reapplies a few months after expending all of its lump sum income on a life-threatening circumstance, and the State determines that the family could have received assistance in those interim months, the State shall only pay AFDC prospectively.

2c. *Question:* "Must a spend down provision be incorporated?"

Answer: It is understood from telephone contact with the Region that the State is asking whether an assistance unit must spend some or all of its lump sum income before its period of ineligibility can be shortened.

The answer is no. States may recompute the period of ineligibility and make payments to applicants who reapply for AFDC when the lump has been or *will be expended* for a life-threatening circumstance. For example, if a family spends its remaining lump sum income for hospital care as a result of a life-threatening circumstance, it should be eligible for assistance upon reapplication if otherwise eligible. However, if the lump sum has not yet been expended, the State should assure itself that the remaining lump sum is actually obligated and will be spent for the purpose intended prior to granting assistance.

2d. *Question:* "Can examples be provided of how to shorten the ineligibility period?"

Answer: Yes. This is one example. In October an AFDC mother and her dependent child receive $1200 lump sum income and $300 other countable income (after the disregards); the State's need standard for two is $300. The assistance unit, therefore, is determined ineligible for 5 months beginning with the corresponding payment month, i.e., December, January, February, March and April ($1500 ÷ $300 = 5 months).

In February, the family reapplies for assistance because $600 of the lump sum was spent for medical expenses incurred when the child was in an automobile accident. If the family spent the money in accordance with State criteria, the period of ineligibility is recomputed. The first step is to subtract from the $1500 received in October the amounts of the lump sum spent for essential needs ($600) in the months prior to reapplication and for medical expenses ($600). Divide the remainder ($300) by the family's need standard ($300) in the month it received the lump sum. The result is that the family has sufficient income for one more month, and would be

eligible again in March. Thus, the period of ineligibility is shortened to 3 months.

2e. *Question:* "Will Quality Control be able to accept the State's determination of the length of the ineligibility period when the State has determined according to its own policy, that the ineligibility period should be shortened?"

Answer: Quality Control reviews are conducted in accordance with permissible State practice. If the State's practice concerning lump sum income is permissible under the approved State plan, Quality Control must accept the State's determination of the length of ineligibility including situations where the State has determined the ineligibility period should be shortened.

We hope the above information addresses Florida's concerns. If you want further clarification regarding lump sum income, please call Roy Simon of my staff (202) 245-3308.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Exhibit H to Defendant Heckler's Answers to Plaintiffs' First Interrogatories (Excerpts from Statement of Richard S. Schweiker, Secretary of Health and Human Services, Before the Senate Committee on Finance Hearing on Spending Cut of the Administration's Economic Recovery Program, Tuesday, March 17, 1981).

***

STATEMENT OF RICHARD S. SCHWEIKER,
SECRETARY OF HEALTH AND HUMAN SERVICES

Secretary Schweiker. Thank you, Mr. Chairman and Senator Long.

First, Let me thank you for your indulgence. I had a meeting with the President this morning. I'm sorry, I'm a little bit late, and I apologize for that.

I'd just like to take a few minutes to show some figures that I think tie into both the points that you are making here this morning, if the committee will indulge me.

Mr. Chairman, Senator Long, I think this is really the key chart in terms of why the Reagan Administration has put forth the cutting program that it has. Why our country is in trouble today and what we must do to correct it.

This basically shows the federal social program outlays from 1950 up to 1980. As you can see from the chart, they were something less than $20 billion back in 1950. Today, they are $300 billion.

As you can see from the escalating geometric progression of the chart, there has been a rapid acceleration rate program to assist families with children who have no other means of support. Before the first dollar of aid is paid, all other sources of income should be pursued and all available income counted.

It is interesting to note that the most prevalent and substantial sources of income not counted for AFDC purposes are provided by the Federal Government.

Nearly all AFDC recipients receive federal food stamps. Yet, the states include an amount for food as part of the AFDC payment.

We believe it is now time to halt this overlap of federal assistance. Our proposal is to allow states to reduce the amount of AFDC paid for food and shelter to the extent it duplicates these other programs.

We also require that income of stepparents, or those assuming the role of stepparents, be counted as available to children living in the same household.

The proposal will prevent those situations in which the children receive AFDC even while they are an integral part of a family grouping with substantial income.

We are also introducing proposals to insure that people assume more personal responsibility for planning the use of income to meet their needs.

When a large amount of money is received as a lump sum, for example, an inheritance, we will consider it as income available for support not only in the month it is received, but to meet needs over a period of time.

***

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Exhibit #1 to Plaintiffs' Brief in Support of Summary Judgment (HHS Memo to Carol H. Harper from Elizabeth Croog, dated 6/7/83; and Excerpt from "Handbook of Public Assistance Administration." 9/6/57).

OFFICE OF THE GENERAL COUNSEL
Social and Rehabilitation Service Division

June 7, 1973

Mr. Carl H. Harper
Regional Attorney
Region IV

Elizabeth A. Croog
Deputy Chief
Assistance Branch

Herbert Carr and Retha Carr, et al., v. *Herschel Saucier, et al.*

In response to your inquiry of May 1 on the above case, the 1964 interpretation referred to in the court order does represent our current policy in this area. That policy is consistent with our interpretation of the regulation in 45 CFR § 233.20(a)(3)(ii)(c), although we recognize that this is not the only possible reading of the somewhat ambiguous language in the regulation.

There seem to be two basic issues of Federal policy involved in the case:

(1) Does a lump sum OASI payment which represents an accumulation of past benefits constitute income?

It is clear from the explanation in Handbook IV-S-3120 (copy attached) that an initial OASI payment representing an accumulation of current monthly benefits, although received in a single sum, is to be treated not as a "lump sum" reserve but as

current income. This interpretation, although contained in Handbook material that was made obsolete by the publication of the regulations in 45 CFR § 233.20, still reflects current policy, as there is nothing specifically to the contrary in the regulation.

The language in the regulation that only such net income as is actually available for current on a regular basis will be considered. . ." (emphasis added) sic has not been interpreted literally — i.e., if a man has irregular earnings, they are still to be counted as income. In effect the regulation has always been interpreted as if it said, "Only such net income as is actually available for current use will be considered, and only such net income as is actually available on a regular basis will be considered as regularly available — e.g., support payments are not to be regularly deducted from the grant unless they are in fact regularly forthcoming. With regard to the specific issue in the present case, the initial OASI payment has been viewed as an accumulation of income paid on a regular basis, and, therefore, countable as income

(2) If the payment does constitute income, for what period is the State to count the income as currently available?

A literal reading of the language in 45 CFR § 233.20(a)(3)(ii)(c) would mean that unless the individual has his total income in hand when the assistance check is issued (or maybe even received), that income may not be deducted in determining the amount of his grant. This would mean that the only time income could be counted would be when it was received at the same time the assistance check was issued (or received). Otherwise the agency would be counting income that the individual had spent (or at least began to spend) and that was no longer available to him. This ridiculous result was clearly not intended by the regulation.

On the contrary, the regulation was intended to preclude the consideration of income that was, in fact, never available to the individual, or that had not been available to him for a substantial period of time. But when a person has, for example, regular earnings, the fact that he spends part of his paycheck before the assistance check arrives does not mean that the entire amount of the paycheck is not to be deducted in determining the amount of the assistance grant.

In fact, States have been permitted considerable administrative latitude in determining the period for which income is reflected in the assistance grant, with the result that income is not always (indeed, is not usually) deducted from the assistance check for the month the income is received and available to the individual. Instead, many States find it administratively simpler and more accurate to deduct the income received in one month from the assistance check for the next month or even for the month after that. This is permitted under Federal policy as a reasonable method of administration, as long as it is applied uniformly and consistently, and it presents no conflict with our interpretation of the regulation on available income.

In the present case, any other interpretation of that regulation would prohibit the agency from ever counting the initial OASI payment. That is, if the individual receives the payment one day, spends it the next, and reports it to the agency the third day, it would no longer be available to him and could never be considered. Even if he receives it, reports it, and then spends it, if it is spent by the time he receives his next assistance check, under the court's reading of the regulation, it could not be deducted from that check. This would, in effect, permit the individual to keep the initial payment as a windfall and continue to receive his full assistance grant.

We agree with the court that this would be a nice thing for the individual, but we do not agree that the State is required by the regulation to do this. Therefore, the method that we approved in 1964 of counting such payments is still approvable under the present regulation, as it has been interpreted.

Incidentally, we would point out that a proposed new regulation allowable resources is about to be published, which, in its present form, would also amend 45 CFR § 233.20(a)(3)(ii)(c) to read:

> "net income available for current use on a regular basis and currently available resources shall be considered: income and resources are considered available both when actually available and when the applicant or recipient has a legal interest therein and, has the legal ability to make them available but does not do so...."

This change will clearly raise additional questions of interpretation.

Handbook of Public Assistance Administration

(SUPPLEMENT FOR ADMINISTRATIVE USE)

Part IV — Eligibility and Payments to Individuals

3100-3199 — Need — 9/6/57

S-3120. Personal Property Reserves

A question was raised recently with regard to a proposed State policy "authorizing public assistance recipients to accumulate personal property up to $300 or $600, providing the accumulation is obtained as a lump sum payment from any source such as insurance, inheritance, old-age or survivor insurance, industrial compensation payments, etc." The following response was given:

> The general idea which seems to be behind this proposal is consistent with current Bureau policy. However, the method of carrying the proposal into effect might, under some circumstances, raise a question. We have not reviewed the State's manual but suggest that if the following conditions are met, no questions would be raised.
>
> The agency should make certain that the kind of resources considered "lump sum" payments are in fact in the nature of a nonrecurring sum or a windfall and *not* a resource that represents accumulated current income received in a single sum. For example, the initial OASI payment representing an accumulation of current monthly benefits would not under Bureau policy represent a "lump sum." In like fashion, industrial compensation payments representing accumulated weekly or monthly amounts would not be thought of as "lump sum" payments. On the other hand, a settlement of industrial compensation as the result of loss of hand or foot might represent a "lump sum" payment.
>
> The State policy should assume that assistance standards do not duplicate the purpose for which the lump sum is received. For example, if part of the

industrial compensation received is to cover medical care costs in connection with the injury, these services should not be duplicated under agency assistance standards.

What the State agency calls "personal property reserves," the Bureau designates under the heading of "Reserves" governed by Handbook Supplement IV-S-3120.3, which includes under the approvable limit not only "lump sum" cash but other liquid assets, i.e. real property, automobiles, etc. You will note that the above-cited statement indicates that the State agency is expected to designate also the purpose for which the reserve is permitted.

—Although the agency's letter mentions only public assistance recipients, we assume that the policy will apply to both the applicants and recipients. (Cleared with GC)

IN THE UNITED STATES DISTRICT COURT
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CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

Exhibit #2 to Plaintiffs' Brief in Support of Summary Judgment (Excerpt from United States' Amicus Brief in Lockhart v. Harden).

DIATRI LOCKHART, *et al.*,	)	
	)	
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	)	CIVIL ACTION
	)	
	)	
vs.	)	
	)	
	)	
RICHARD HARDEN, *et al.*,	)	
	)	
	)	
	)	NO. 0 74 390 A
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BRIEF ON BEHALF OF THE
UNITED STATES AS AMICUS CURIAE

INTRODUCTION

As directed by this Court's order of March 19, 1974, the Secretary of Health, Education and Welfare (herein, "Secretary") will address the question of whether the challenged sections of Georgia's approved state plan under Title IV-A of the Social Security Act conform to federal requirements.

ARGUMENT

***

A. Under the applicable federal requirements, a lump sum child support arrearage payment must be considered as "income" and not as a "resource."

Plaintiff's theory rests on this Court's decision in *Carr* v. *Saucier*, C.A. No. 16, 704, May 29, 1973. In that case it was held that 45 C.F.R. § 233.20(a)(3)(ii)(c) requires that a lump sum OASDI payment representing accumulated monthly benefits be considered as a resource, not as income on the ground that such a payment is not "regularly available." The Secretary, however, has traditionally interpreted the regulation as requiring that such a lump sum payment (as opposed to a "true" lump sum payment such as an award of damages) be treated as income in the month received or in one of the two months thereafter and any portion then remaining be treated as a reserve (cash resource) in the following month. In effect, the regulation and its virtually identically worded predecessor Handbook provision, § IV-3131(7), have been interpreted as if they read "only such net income as is actually available for current use will be considered, and only such net income as is actually available on a regular basis will be considered as regularly available." A lump sum payment such as an OASDI lump sum or a child support arrearage payment is viewed as an accumulation of income accruing on a regular basis and therefore countable as income.

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(Title Omitted in Printing)

Exhibit #4 to Plaintiffs' Brief in Support of Summary Judgment (Letter from M. Moleski, Acting Regional Commissioner, HHS, to B. Stumbras, Administrator, Wisconsin Department of Health and Social Services).

April 8, 1982

Our Reference: SD5A

Bernard Stumbras, Administrator
Division of Economic Assistance
Wisconsin Department of Health
and Social Services
P.O. Box 8913
18 South Thornton Avenue
Madison, Wisconsin 53708

Dear Mr. Stumbras:

This is to confirm the information discussed by telephone with Gary Kuhnen of your staff regarding the treatment of *income tax refunds* in determining eligibility for Aid to Families with Dependent Children and the amount of the assistance payment.

We have been advised by our central office that "Tax refunds must be treated as unearned income or *resources*, but State have flexibility of defining casual and inconsequential income."

"Windfall receipts" (such as gifts, inheritances, lottery winnings, or damage claims settlements) may be considered at the State's option, either as income subject to Federal policy in 45 CFR 233.20(a)(3)(ii)(D) or as a resource only. An accumulated monthly benefit such as veterans benefits or social security benefits is not considered windfall and must be treated as income.

Payments defined as income in 45 CFR 233.20 must, of course, be considered as income.

With regard to "casual and inconsequential" income, States have always been allowed some latitude in not counting small sporadic bits of income. This practice in most States covers such things as birthday gifts and other nonrecurring small amounts of money that do not realistically represent income available to meet the family's living needs.

Sincerely,

Marlene M. Moleski
Acting Regional Commissioner

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
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(Title Omitted in Printing)

Unmarked Exhibit to Federal Defendant's Motion for Summary Judgment (Excerpt of Prepared Statement of Richard S. Schweiker Before the House Committee on Ways and Means, Subcommittee on Public Assistance and Unemployment Compensation. "Administration's Proposed Savings in Social Services Programs," March 11, 12, 1981).

***

The American people strongly oppose assistance going to those who can work, those who have other sources of income, and those who get as much — or more — on welfare as others get from working.

They believe, and this Administration agrees, that people who can take personal responsibility for themselves ought to do so.

But the American people are compassionate and generous toward those who through no fault of their own have no other choice but to rely on public programs to meet their basic needs. The kinds of changes I will be describing today need to be made to bring the public assistance programs in line with our country's concerns.

AFDC

In AFDC, the proposals are designed to improve the program by:

Limiting eligibiity to those most in need;

Strengthening work requirements;

Making AFDC a temporary safety net for those who are not economically independent;

Emphasizing individual responsibilities; and

Improving administration.

***

EMPHASIZING INDIVIDUAL RESPONSIBILITY

We are also introducing proposals to ensure that people assume more personal responsibility for planning the use of income to meet their needs. When a large amount of money is received as a lump-sum, for example, an inheritance, we will consider it as income available for support not only in the month it is received but to meet future needs. This would be accomplished by requiring that the lump-sum payment be divided by the State's standard of need. The recipient would be ineligible for assistance for the number of months that result from that computation.

As another matter of personal responsibility, we will require that AFDC overpayments be repaid. At the same time, of course, we will require States to make good on underpayments.

***

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
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(Title Omitted in Printing)

Exhibit P to Affidavit of C. Hall, Attached to State Defendant's Cross Motion for Summary Judgment (Letter from L. Mapp, State Program Specialist, Department of Health and Human Services, to C. Hall, Virginia Department of Social Services, October 17, 1983).

October 17, 1983

Constance O. Hall, Chief
Bureau of Economic and Medical
Assistance
Division of Benefit Programs
Department of Social Services
8007 Discovery Drive
Richmond, Virginia 23288

Dear Ms. Hall:

In your letter of September 21, 1983, you requested a regulatory citation for differential treatment of lump-sum payments. I trust that this letter will clarify this issue.

Based on longstanding precedent, States have historically had the option to consider nonrecurring lump-sum payments as either unearned income or resources. With the implementation of OBRA, States continued to exercise this latitude.

According to a recent memo on this issue, signed by Ms. Jo Anne Ross, Associate Commissioner for Family Assistance, the general rule, as reflected in Section 402(a)(7) of the Social Security Act and Federal regulation at 45 CFR 233.20 (a)(3)(ii)(A), is that all income and resources, whether regularly or irregularly received or earned or unearned, of any individual applying for or receiving assistance, will be considered in determining eligibility and the amount of assistance with the exception of certain disregards

required or permitted under the Act or other Federal law. Under this rule, States have been permitted their choice of treating non-recurring or "windfall" lump-sum payments as income or resources. Examples of windfall nonrecurring payments are gifts, inheritances, lottery winnings, damage claim settlements, insurance death benefits, etc. Lump-sum payments that are actually an accumulation of current income received in a single sum are not considered windfall in nature and must be treated as income. For example, the initial OASDI payment representing an accumulation of current monthly benefits must be counted as lump-sum income and cannot be considered as a resource. Ms. Ross's memo further states that OFA Central Office is carefully reviewing whether or not to continue this policy on windfall payments. Beyond this, we are unaware of any regulatory provision that contains a specific reference to this issue.

***

Should you have further questions do not hesitate to contact me.

Sincerely,

/S/
Lois J. Mapp
State Program Specialist

IN THE UNITED STATES DISTRICT COURT
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(Title Omitted in Printing)

Exhibit A to Federal Defendant's Response to Plaintiffs' Reply Brief (Draft Bill to Amend the Social Security Act).

A BILL

To amend the Social Security Act to increase the effectiveness and improve the administration of certain programs under the Act, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Social Welfare Amendments of 1981."

TITLE I — AMENDMENTS TO THE PROGRAM OF AID TO FAMILIES WITH DEPENDENT CHILDREN

Determination of Income and Resources for AFDC

***

Treatment of Income in Excess of the Standard of Need

Sec. 104. Section 402(a) of the Social Security Act is amended by adding immediately after paragraph (16) the following new paragraph:

> "(17) provide that if a person specified in paragraph (8)(A) or (B) receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the

State's standard of need applicable to the family of which he is a member —

"(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (B), divided by (ii) the standard of need applicable to such family, and

"(B) any income remaining (which amount is less than the applicable standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A);"

***

IN THE UNITED STATES DISTRICT COURT
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(Title Omitted in Printing)

Exhibit B to Federal Defendant's Response to Plaintiffs' Reply Brief (Statement by Richard S. Schweiker, Secretary of Health and Human Services, Before the Committee on Ways and Means, House of Representatives, Wednesday, February 25, 1981).

MR. CHAIRMAN AND MEMBERS
OF THE COMMITTEE:

***

I will be discussing today the specific issues and proposals relating to the social security program of old-age, survivors, and disability insurance (OASDI), the program of aid to families with dependent children (AFDC), the social services programs, and other related programs that we administer. We believe that these proposals are meritorious in and of themselves. Yet they are also a part, if only a small part, of the larger total program the President has outlined. Thus, as we discuss the specific proposals, we must keep in mind the importance of the overall economic recovery plan — the total package of initiatives to restore the health and vigor of the national economy. We must not lose sight of the benefits that will accrue to all citizens with enactment of the President's total program for economic recovery.

At the same time, I want to assure you that — as President Reagan stated so forcefully last Wednesday — none of these proposals represents in any sense a turning away from the conscience of the Nation, from our commitment to the needy, the aged, or others who justly depend upon existing public programs. The safety net of social programs upon which so many Americans must rely is not being weakened or withdrawn.

***

Aid to Families with Dependent Children (AFDC)

In the AFDC program, we are proposing a number of changes.

— Some will target benefits to the families who have only minimal income in addition to their AFDC payment.

— Some will provide for better administration at the State level.

— Some will insure that those individuals who should financially support AFDC recipients do so, thereby reducing the burden on public assistance.

The safety net that AFDC provides to the group in our society which is most vulnerable — the children — will not be weakened.

Conclusion

In conclusion, Mr. Chairman and Members of the Committee, let me again urge you to take prompt action on all of the proposals that President Reagan outlined last week:

- These proposals are meritorious in and of themselves;
- They preserve the basic social safety net upon which needy Americans must rely; and
- They are necessary first steps toward strengthening the Nation's economy.

Again, I am pleased to have had this opportunity to discuss these matters with the Committee. I will be happy to respond to any questions you may have.

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(Title Omitted in Printing)

Exhibit C to Federal Defendant's Response to Plaintiffs' Reply Brief (Statement by Richard S. Schweiker, Secretary of Health and Human Services, Before the Committee on Budget, House of Representatives, Wednesday, March 18, 1981).

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

It is a pleasure to appear before you today to present the Reagan administration budget proposals for 1981 and 1982 for the Department of Health and Human Services.

This budget for 1982 totals $255.3 billion in budget authority and $250.7 billion in outlays, an increase of $27.5 billion and $21.5 billion respectively above 1981. While this budget contains increases and decreases, this net increase is necessary to preserve and maintain this Department's commitment to social safety net programs. Provision of these benefits to the most needy is one of the President's highest priorities.

***

This budget is an essential part of the President's program for economic recovery. As the president indicated, his program does not rely upon complex theories or elaborate government programs. Instead it recognizes the basic economic facts of life, and begins to move us, as humanely as possible, back toward economic sanity.

For this program to succeed, budget control is essential. The excessive past rates of increase in federal outlays have inhibited economic growth, raised the Nation's real tax burden, diverted resources from more productive private uses, and discouraged production and investment.

The revised budget for this Department is consistent with the principal goals of the President:

- First, it maintains our Nation's commitment to protecting benefits for retired workers and assisting those most in need of support from the Federal Government;
- Second, it slows the growth of Federal spending to move toward a balanced budget; and
- Third, it restores the States and their local governments to full and effective partnership in the Federal system.

The budget I present today reflects the significant policy changes needed to achieve these goals. Our budget and legislative proposals emphasize:

***

- *Reform of entitlement program* to eliminate unintended benefits and to avoid unnecessary costs. Legislation will be proposed to limit unconstrained growth in the Medicaid program, to assure that the Aid to Families with Dependent Children program is available to the most needy only, to eliminate certain secondary Social Security benefits, and to tighten eligibility for Disability Insurance.

***

A major legislative initiative is being proposed for the AFDC program to better target welfare assistance on those most in need, to reduce incentives for remaining on assistance and to improve program management. The major provisions are:

***

These and other changes will result in an estimated $1.0 billion in Federal Savings in 1982, growing to $1.3 billion by 1986. State and local government savings are expected to total approximately $850 million in 1982.

***

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Exhibit D to Federal Defendant's Response to Plaintiffs' Reply Brief (Excerpts from Prepared Statement of Secretary Schweiker, U.S. Congress, Senate Committee on Finance, "Spending Reduction Proposals," March 17, 1981).

***

AFDC as a temporary safety net

Our next set of proposals is aimed at assuring that the AFDC program is available only as a temporary program to assist families with children who have no other means of support. Before the first dollar of aid is paid, all other sources of income should be pursued and all available income counted. However, under current law, many actual and potential sources of income to AFDC recipients are ignored. We propose to close these loopholes.

***

Emphasizing individual responsibility

We are also introducing proposals to ensure that people assume more personal responsibility for planning the use of income to meet their needs. When a large amount of money is received as a lump sum for example, an inheritance, we will consider it as income available for support not only in the month it is received but to meet future needs. This would be accomplished by requiring that the lump-sum payment be divided by the State's standard of need. The recipient would be ineligible for assistance for the number of months that result from that computation.

As another matter of personal responsibility, we will require that AFDC overpayments be repaid. At the same time, of course, we will require States to make good on underpayments.

***

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
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Exhibit F to Federal Defendant's Response to Plaintiffs' Reply Brief (Excerpts from U.S. Congress, House Committee on Ways and Means. "Tax Aspects of the President's Economic Program" Part 1. 97-1 Feb. 24, 25; March 3, 4, 5, 25, 26, 27, 30, 31, and April 1, 2, 3, 7, 1981).

Lump-Sum Payments

Averaging Unearned Income Received as a Lump-Sum Payment

Current Law

Lump-sum payments that meet the definition of income (e.g., retroactive title II payments) are presently counted as income in the month of receipt and, to the extent retained, resources thereafter.

Proposed Change

Require that lump-sum payments be considered available to meet ongoing needs in the AFDC program: i.e., the lump-sum payment shall be considered as income in the month received. If such payment exceeds the standard of need, the household would be ineligible for aid. Any amount of the lump-sum payment that exceeds the monthly needs standard would be divided by the monthly needs standard, and the household would be ineligible for aid for the number of months resulting from that calculation.

Rationale

All income available to recipients of AFDC should be taken into account in determining benefit amounts and continued eligibility. This proposal will eliminate the disincentive for recipients to budget lump-sum amounts over a period of time while encouraging the use of these payments to meet basic needs.

Effects

This proposal will reduce or eliminate AFDC benefit payments to recipients receiving lump-sum amounts for the subsequent months in which the prorated lump-sum amount exceeds the State's AFDC needs standard.

Lump-Sum Payments

Number of AFDC Families Removed from Rolls **5,000**

Budget Impact (in $ Millions):

		FY 82	FY 83	FY 84	FY 85	FY 86
AFDC Benefits	Federal	-5	-5	-5	-5	-5
	State	-4	-4	-4	-4	-4
AFDC Admin.	Federal	Negligible Savings				
	State	Negligible Savings				
FOOD STAMPS	Federal	+2	+2	+2	+2	+2
NET IMPACT	Federal	-3	-3	-3	-3	-3
	State	-4	-4	-4	-4	-4

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Exhibit G to Federal Defendant's Response to Plaintiffs' Reply Brief (Testimony of Kevin M. Aslanian, President, Welfare Recipients League, Inc., House Committee on Ways and Means, "Administration's Proposed Savings in Social Services Programs").

***

Mr. Aslanian. OK. Let me touch on one or two things and highlight. One of the proposals is that income tax credit be considered during the year. We would oppose that. Either you abolish it or give it to us on the way back. But don't count it when we don't have it.

Do you follow what I am saying? I don't know if it is understandable.

One of the worst things that the administration is proposing is to pro rate lump-sum income. For example, a woman and a man were living together with three kids. They had a car accident; something happened to him. He got his disability. That ran out and he had a lawsuit. Finally, after a couple of years it is settled, and now he gets $1,500. The administration is proposing that you could use this $1,500 to support yourself as follows: in Mississippi you would be off of welfare for 12 months; in Texas you would be off of welfare for 10 months; in South Carolina you would be off of welfare for 10 months; in Tennessee you would be off of welfare for 10 months.

For 10 months people are going to have to live on $1,500. The fact that it is gone, who cares? The administration doesn't care.

Then a problem we have is the administration is suggesting that any working family who makes over 150 percent of the need standard would be ineligible for AFDC because they are making

too much. In Mississippi, that is any women who makes $180. In Puerto Rico — this is a family of four I am talking about — in Puerto Rico, $147; in Texas, $210; Alabama, $222; in South Carolina, $237.

I don't know if you believe that a family getting $222 is getting too much.

***

Statement of Kevin M. Aslanian, President,
The Welfare Recipients League, Inc.

IN THE UNITED STATES DISTRICT COURT
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49 Fed. Reg. 45558 (1984), Proposed Amendment to 45 C.F.R. § 233.20(a)(3)(ii)(F).

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SUMMARY

The Social Security Administration is proposing to amend regulations' relating to the Aid to Families with Dependent Children (AFDC) program under title IV-A and the adult categories under titles I, X, XIV or XVI (AABD) of the Social Security Act. This action is being taken (sic) promote fiscal savings, reduce the paperwork burden and increase State flexibility in the administration of these programs. Specifically, we propose to amend 45 CFR Parts 201, 205, 206, 225, 232, 233, 234, 235, 237.

***

Counting Windfalls as Income — 45 CFR 233.20(a)(3)(ii)(F)

Counting Income Tax Refunds as Resources — 45 CFR 233.20(a)(3)(iv)(E)

The general rule in assistance programs is that all earned and unearned funds received by an assistance unit must be counted as income for the month of receipt except funds that are expressly disregarded as income in a Federal statute. However, under longstanding Federal policy for the AFDC and adult assistance programs, a State agency may treat nonrecurring payments which are in the nature of a windfall as resources instead of as income. A windfall is a sum that is not earned, does not occur on a regular basis, and does not represent accumulated monthly income received in a single sum. A windfall might come from an inheritance, lottery winnings, or an income tax refund, but not title II Social Security or VA benefits. Social Security or VA benefits covering more than one month's benefits are instead examples of accumulated monthly income received in a single lump sum.

In reviewing the legislative history of OBRA, we believe that the Congress intended all lump sum payments (including windfalls) to be treated as income under the AFDC program. The Senate Finance Committee Report, No. 97-139, dated November 17, 1981, (on page 505) indicates that lump sum income should be "considered available to meet the ongoing needs of an AFDC family...". Given the intent of the lump sum provision to assure use of available funds in future months, we believe that windfall payments should be considered lump sum income. In the absence of the proposed change, the very type of payments Congress intended be counted and used to meet the family's future needs may not be budgeted for meeting future needs, if treated initially as a resource and not retained. Accordingly, for AFDC, we plan to classify payments in the nature of a windfall (with the sole exception of income tax refunds) as unearned income from a nonrecurring source and treat them as a lump sum in accordance with 45 CFR 233.20(a)(3)(ii)(F) unless otherwise disregarded, e.g., under the casual and inconsequential income policy at 45 CFR 233.20(a)(3)(iv).

With respect to income tax refunds, except for an Earned Income Credit payment, a tax refund recognizes that there was an overwithholding of taxes during the year. Under the AFDC program, since the $75 standard work expense disregard applies to gross income and represents all work expenses excluding child care, the actual amount of tax withheld has no bearing on the income counted or the amount of actual assistance payable to a recipient. Thus, since some portion of the income tax withholding may have exceeded, in combination with other work expenses, the $75 standard disregard, and therefore may have already been counted as income, it should not again be counted as income when it is returned to the recipient.

Therefore, for the AFDC program we are proposing to make an exception in the case of income tax refunds and require States to treat these refunds only as resources (liquid assets). However, any portion of a tax refund which represents an earned income credit (EIC) payment would still be considered as earned income in accordance with 45 CFR 233.20(a)(6)(ix)(C). The EIC portion of any tax refund (or any EIC payments for that matter) must be treated as earned income because the statute specifically requires

that such payments be considered as earned income (section 402(d) of the Social Security Act). When EIC payments are made in a single lump sum they are paid through the income tax collection system. Thus, in those cases, the payments would come in the form of a tax refund.

Neither the lump sum income change nor the $75 standard work expense change applies to the adult assistance programs. Therefore, we are not changing the policy in effect for these programs. At State option, these payments may be considered either as income or as a resource.

We estimate savings of up $1 million annually.

***

PART 233 — [AMENDED]

F. Part 233 is amended as set forth below:

***

§ 233.20 Need and amount of assistance.

(a)***
(3)***
(ii)***

***

(F) When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring lump sum income (including for AFDC, title II and other retroactive monthly benefits, and payments in the nature of windfall, e.g., inheritances or lottery winnings), the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility shall begin with the month of receipt of the nonrecurring income or, at State option, as late as the corresponding payment month.

***

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
CIVIL ACTION NO. 83-0493

(Title Omitted in Printing)

51 Fed. Reg. 9191 (1986), Amendment to 45 C.F.R. § 233.20(a)(3)(ii)(F), Effective March 18, 1986.

SUMMARY: This final rule amends regulations relating to the Aid to Families with Dependent Children (AFDC) program under title IV-1 and the adult categories under titles I, X, XIV, or XVI (AABD) of the Social Security Act to promote fiscal savings, reduce the paperwork burden and increase State flexibility in the administration of these programs. Specifically, regulations at 45 CFR Parts 201, 205, 206, 225, 232, 233, 234, 235, and 237 are amended.

***

Counting Windfalls as Income (Section 233.20(a)(3)(ii)(F) of the Final Regulations)

Counting Income Tax Refunds as Resources (Section 233.20(a)(3)(iv)(E) of the Final Regulations)

The general rule in assistance programs is that all earned and unearned funds received by an assistance unit must be counted as income for the month of receipt except funds that are expressly disregarded as income in a Federal statute. However, under longstanding Federal policy for the AFDC and adult assistance programs, a State agency has had the option to treat nonrecurring payments which are in the nature of a windfall as resources instead of as income. A windfall is a sum that is not earned, does not occur on a regular basis, and does not represent accumulated monthly income received in a single sum. A windfall might come from an inheritance, lottery winnings, personal injury awards or an income tax refund, but not title II Social Security or VA

benefits. Social or VA benefits covering more than one month's benefits are instead examples of accumulated monthly income received in a single lump sum.

In reviewing the legislative history of OBRA, we believe that the Congress intended all lump sum payments (including windfalls) to be treated as income under the AFDC program. The Senate Finance Committee Report, No. 97-139, dated November 17, 1981 (on page 505) indicates that lump sum income should be "considered available to meet the ongoing needs of an AFDC family...". Given the intent of the lump sum provision to assure use of available funds in future months, we believe that windfall payments should be considered lump sum income. In the absence of the change, the very type of payments Congress intended to be counted and used to meet the family's future needs may not be budgeted for meeting future needs, if treated initially as a resource and not retained. Accordingly, for AFDC, we have classified payments in the nature of a windfall (with the sole exception of income tax refunds) as unearned income from a nonrecurring source and treat them as a lump sum in accordance with § 233.20(a)(3)(ii)(F) unless otherwise disregarded, e.g., under the casual and inconsequential income policy at § 233.20(a)(3)(iv).

***

Neither the lump sum income change nor the $75 standard work expense change applies to the adult assistance programs. Therefore, we are not changing the policy in effect for these programs. At State option, these payments may be considered either as income or as a resource.

We estimate savings of up to $1 million annually.

Comment: Twenty four commenters expressed concern about this provision suggesting that flexibility remain with the States to determine whether to count payments in the nature of a windfall as income or resources. The commenters argue that: (1) There is no inferred or expressed Congressional intent in OBRA's legislative history that HHS should change its longstanding policy of permitting States to count payments in the nature of a windfall as income or resources, i.e., by the OBRA amendments, Congress meant to change the methodology applicable to lump sum income but not the definition of lump sum income; (2) there is logic to treating retroactive benefits in this manner because they

are linked to ongoing benefits which can be used to meet future needs, while this is not so with nonrecurring windfall type benefits; (3) the statute provides a $1,000 resource limit and individuals who do not have the maximum resource limit when they come on the rolls but subsequently receive a windfall payment should be allowed to build up their resource limit from nonrecurring lump sum payments; and (4) individuals should be able to set aside the money from windfall payments for items not covered by the AFDC grant or Medicaid such as treatment, special education, special equipment, etc., or simply to build up a cushion for future emergencies.

Response: We have carefully considered the comments received and continue to believe that the provision is not only supportable under the statute but consistent with recent legislative history that large nonrecurring payments be considered available to meet the ongoing needs of an AFDC family. There is no logical basis for distinguishing between one type of large nonrecurring payment and another in determining whether it is income or resources and whether to apply the lump sum rule. From one standpoint, the legislative history expresses concern that considering such payments, prior to OBRA, as income in the month received and a resource thereafter had the perverse effect of encouraging the family to spend the income as quickly as possible in order retain AFDC eligibility. Since some States have always considered such payments as income, there was no specific definition of lump sum income that existed that can be argued that the Congress intended to maintain. Given the Congress' clear intent to have lump sums be used to meet future needs, States should not be allowed to exclude them by calling them resources.

States must disregard from the lump sum payment any amount that is earmarked and used for the purpose for which it is paid, i.e., monies paid for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair or resources, etc.

Finally, section 402(a)(17) of the Act, as amended by the Deficit Reduction Act of 1984 (Pub. L. 98-369), permits States to consider hardship situations and recalculate, under certain specified circumstances, the period of ineligibility determined under the lump sum rule.

Comment: There were several comments specifically in relation to personal injury awards and worker compensation payments. One commenter suggested that, because personal injury awards have been the subject of court challenge, we specify in the regulation how personal injury awards are to be treated. This would clarify the policy and avoid future misunderstanding as to their treatment. Several commenters suggested expanding the definition of funds treated as resources to specifically include worker's compensation payments and personal injury settlement payments. One commenter noted that Federal income taxes do not have to be paid on personal injury awards, yet for AFDC purposes such payments are counted as income.

Response: We agree that specifying in regulations how personal injury awards and workers' compensation payments are to be treated is necessary. We, therefore, have amended the regulation to clarify that personal injury awards and worker compensation must be treated as a lump sum income. We believe it is consistent with Congressional intent that nonrecurring lump sum payments be used to meet current as well as future needs and that personal injury and worker compensation awards are encompassed by the lump sum rule. States are required to exclude from consideration, in determining the amount of the lump sum, that portion of the money that is earmarked and used for the purpose for which paid.

***

PART 233 — (AMENDED)

Part 233 of Chapter II, Title 45, Code of Federal Regulations is amended as set forth below:

***

PART 233 — COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

***

§ 233.20 Need and amount of assistance.

(a)***
(3)***
(ii)***

(F) When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income (including for AFDC), title II and other retroactive monthly benefits, and payments in the nature of a windfall, e.g., inheritances or lottery winnings, personal injury and worker compensation awards, to the extent it is not earmarked and used for the purpose for which it is paid, i.e., monies for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair of resources, etc.), the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility shall begin with the month of receipt of the nonrecurring income or, at State option, as late as the corresponding payment month.***

***

No. 85-1358

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER
VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER,
OPAL MAE COOK, STELLA KING, AND ALL
OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF PETITIONER

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QUESTION PRESENTED

Whether, under the Social Security Act, a state can require a recipient of an Aid to Families with Dependent Children (AFDC) grant who receives a lump sum personal injury award to use such funds to meet future living expenses in lieu of allowing such recipient to spend the funds to regain AFDC eligibility?

PARTIES TO THE PROCEEDINGS

The parties in the proceedings below include plaintiffs Ona Mae Reed, Sallie Long, Ruth Wilcher, Opal Mae Cook, Stella King, and all others similarly situated; William L. Lukhard, Commissioner, Virginia Department of Social Services; and the Secretary of the United States Department of Health and Human Services.

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No. 85-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER
VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER,
OPAL MAE COOK, STELLA KING, AND ALL
OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF PETITIONER

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 774 F.2d 1270 (4th Cir. 1985) and is set forth in the Petition Appendix ("Pet. App.") at pages 1-22.

The Order of the court of appeals denying petitioner's motion for rehearing with a suggestion for rehearing *en banc* is set forth in the Petition Appendix at pages 55-57.

The Order of the court of appeals staying its mandate is set forth in the Petition Appendix at pages 58-60.

The Order of the court of appeals denying respondents' motion

to vacate or modify the stay of mandate is set forth in the Petition Appendix at pages 61-62.

The Opinion and Order of the United States District Court for the Western District of Virginia, Roanoke Division, is reported at 591 F. Supp. 1247 (W.D. Va. 1984), and is included in the Petition Appendix at pages 23-52.

The Final Order of the district court, issued on October 3, 1984, is set forth in the Petition Appendix at pages 53-54.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1985. (Pet. App. 1). Petitioners filed a petition for rehearing with a suggestion for an *en banc* rehearing on October 31, 1985, which the court of appeals denied on November 14, 1985. (Pet. App. 55). The court of appeals stayed the mandate on November 21, 1985, upon motion of the petitioner, pending application to this Court for a writ of *certiorari*. (Pet. App. 58). This Court granted the writ of *certiorari* on June 23, 1986. 59 U.S.L.W. 3840 (U.S. June 23, 1986) (No. 85-1358). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Because of their length the provisions of law involved in this case are set out verbatim in the Petition, Appendix D or in the Appendix of this brief. Those provisions of law are:

1. 42 U.S.C. § 602(a)(17). (Pet. App. 63).
2. 42 U.S.C. § 602(a)(17) (amended 1984). (Pet. App. 64-65).
3. 45 C.F.R. § 233.10(a)(1). (Pet. App. 66-67).
4. 45 C.F.R. § 233.20(a)(3)(ii)(D). (Pet. App. 68). Subsequent version at 45 C.F.R. § 233.20(a)(3)(ii)(F). (Pet. App. 69).

5. 51 Fed. Reg. 9191 (1986) (to be codified at 45 C.F.R. § 233.20(a)(3)(ii)(F)). Attached hereto at Brief, Appendix 23.
6. Virginia Department of Social Services Aid to Dependent Children Manual § 305.4(C). (Pet. App. 71-77).
7. Virginia Department of Social Services Aid to Dependent Children Manual § 305.4(C) (amended 1985). (Pet. App. 78-89).

STATEMENT OF THE CASE

The central issue presented in this case is whether personal injury awards may continue to be treated by the Commonwealth of Virginia as "income" in determining eligibility for grants under the Aid to Families with Dependent Children (AFDC) program, as required by recent regulations issued by the U.S. Department of Health and Human Services.[1] Under Virginia Aid to Dependent Children (ADC) rules, property damage awards are treated differently. Property damage awards are considered the equivalent of the property that was lost and, thus, are counted as a "resource" exempt or partially exempt from consideration in determining a potential recipient's need for benefits. Personal injury awards (less allowable expenses), however, are considered windfall payments, not necessary to replace a family resource such as a car or house and, thus, are free to be spent without restriction by potential AFDC recipients. Such payments, therefore, are counted as "income" which is considered in its entirety in determining a potential recipient's need for government subsistence payments under the AFDC program.

On June 6, 1983, Respondents Reed, Long and Wilcher initiated a class action challenging this distinction made between personal injury and property damage awards. Respondents argued that Virginia's treatment of personal injury awards as "income" violated the Social Security Act, 42 U.S.C. §§ 602(a)(7),

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[1]The AFDC program is codified at 42 U.S.C. §§ 601-615. Current rules defining "income" are set forth at 51 Fed. Reg. 9191, (1986) (to be codified at 45 C.F.R. § 233.20(a)(3)(ii)(F)). (Brief App. 23) (J.A. 82-86).

(a)(10), and (a)(17). Subsequent to the initiation of this suit, Respondents Cook and King were allowed to intervene as plaintiffs, and the U.S. Department of Health and Human Services was joined as a necessary party.

This controversy arose because of an amendment to 42 U.S.C. § 602(a)(17) (Pet. App. 63), which was enacted in 1981 as a part of an extensive attempt to cut the federal budget.[2] This amendment created what is known as the "lump sum rule" which provides for a period of prospective ineligibility for AFDC benefits whenever a member of the AFDC family has received a nonrecurring lump sum payment.[3] In essence, under the rule, the lump sum payment becomes the family's AFDC grant for a prescribed period. The period of ineligibility is determined by dividing the total of a family's lump sum payment and other income by the family's monthly standard of need. The resulting quotient represents the number of months of disqualification. (Pet. App. 71).

The 1981 OBRA amendment required the states to incorporate the lump sum rule into their AFDC plans. In response to this requirement, Virginia adopted § 305.4(C) of the Department of Social Services' (DSS) Aid to Dependent Children Manual (the "Manual"). (Pet. App. 71). This provision requires all

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[2]Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, § 2304, 95 Stat. 357, 845 (1982). Prior to passage of OBRA in 1981, all payments that represented an accumulation of current income received in a single sum, such as Old Age, Survivors and Disability Insurance (OASDI) benefits, were required to be considered as income for purposes of the AFDC program. (J.A. 55, 56). Certain other payments, such as inheritances and insurance awards, were considered "windfall" payments. (J.A. 82). States were allowed to treat such windfall payments either as income or as a resource. (J.A. 58, 66, 83, 84). Those windfall payments treated as income were regarded as income *only* in the month received; thereafter, to the extent that any money was left, it was considered a resource. Whether treated as a resource upon receipt or in the months following the month of receipt, such windfall awards reduced a family's need and affected eligibility for AFDC grants *if retained*. (J.A. 25). If expended, the family was eligible for AFDC benefits in the month next after the resource was spent down to permissible levels.

[3]The respondents also challenged the application of the lump sum rule to AFDC recipients who were without earned income. The district court granted petitioner's Motion for Summary Judgment on that issue, and no appeal was taken. 591 F. Supp. at 1253-1254. (Pet. App. 37-41).

nonrecurring lump sums, including personal injury awards, to be considered "income" available to meet subsistence expenses in the months following receipt.[4] Under this provision, receipt of a personal injury award renders a family ineligible for AFDC benefits for a period of time which, as indicated above, is based on the size of the award and the family's need. For example, if the state's need standard were $400 per month, under this rule a family which received a personal injury award equal to $20,000 after deduction of allowable expenses would be ineligible for assistance for approximately 50 months on the theory that the award would be spent wisely over these months to meet basic needs.[5] If the same award were treated as a "resource", however, the family could spend the entire amount on consumer goods such as TVs, stereos, appliances or jewelry and regain eligibility for full AFDC benefits immediately.

Upon cross-motions for summary judgment, the district court held that personal injury awards should not be treated as "income" for purposes of determining AFDC eligibility under the lump sum rule. The district court, relying upon the dictionary definition of income and the meaning of income in the context of

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[4]Virginia's application of the lump sum rule has been approved by the U.S. Department of Health and Human Services at all times relevant to this case as being in compliance with the federal statute and implementing regulation.

[5]Before the period of ineligibility is calculated, the lump sum is reduced by associated expenses, such as medical and rehabilitative expenses and legal fees which were incurred prior to or within thirty days after receipt of the award. (Pet. App. 72). Thus, the amount of a lump sum personal injury award subject to the rule is that portion representing pain and suffering, loss of earning capacity, future medical expenses, and punitive damages.

At the time the complaint in this case was filed in the district court, in accordance with the provisions of 45 C.F.R. § 233.20(a)(3)(ii)(D) (Pet. App. 68), § 304.4(C) of the Manual allowed the lump sum to be reduced further only where a life-threatening circumstance existed and the lump sum had been or would be expended for such circumstances. (Pet. App. 75).

Congress amended 42 U.S.C. § 602(a)(17) in 1984 (Pet. App. 64), enabling states to deduct additional expenses from lump sums and thereby shorten a family's period of ineligibility for a number of less than life-threatening circumstances, among them the incursion of additional medical expenses by the family beyond the thirty-day period. The Virginia Board of Social Services, after complying with the requirement of the State Administrative Process Act, implemented this option on September 19, 1985. (Pet. App. 78).

the Internal Revenue Code, concluded that the ordinary meaning of income does not encompass compensation for personal injuries. 591 F. Supp. at 1256-1257. (Pet. App. 47-51). The district court further concluded that Congress intended to limit the application of the lump sum rule to those lump sum payments that met the meaning of ordinary income. *Id.* Accordingly, the court enjoined the state from counting lump sum personal injury payments as income rather than as a resource. (Pet. App. 53).

The Commonwealth appealed this decision on the ground that personal injury recoveries were properly treated as income for purposes of applying the lump sum rule. The court of appeals affirmed the decision of the district court holding that, in adopting 42 U.S.C. § 602(a)(17), Congress intended to reach only payments that ordinarily would be considered income and not all large payments of money. 774 F.2d at 1273-1275. (Pet. App. 11-17). The court of appeals further held that Virginia's regulation applying the lump sum rule to personal injury awards was arbitrary and inequitable and thus violated 45 C.F.R. § 233.10(a)(1), the "equitable treatment regulation." *Id.* (Pet. App. 66).

On June 23, 1986, this Court granted Virginia's petition for a writ of *certiorari* to determine whether the Commonwealth's interpretation of the lump sum rule, which encourages potential AFDC recipients to spend personal injury awards wisely to defray living expenses over a period of time, is consistent with congressional intent and, therefore, valid under the Social Security Act.

SUMMARY OF ARGUMENT

The word "income" as used in 42 U.S.C. § 602(a)(17) has never been defined by Congress within the AFDC program. It does not have a clear, plain meaning, and its meaning varies depending on the circumstances of its use. In the context of the lump sum rule, it is clear Congress intended to include in the definition of "income" all large payments of money, including personal injury awards. To hold otherwise would subvert the policy objectives of fiscal restraint and individual responsibility that the lump sum rule was enacted to serve.

The court of appeals' reliance upon statutory language and interpretations drawn from programs and sources outside the AFDC program to fashion a common definition for the term "income" was both misplaced and erroneous. The court of appeals not only misread the meaning of income in these other contexts, but also gave "income" the same meaning in the AFDC program as in those contexts, regardless of differences in program goals and objectives. Such uniform treatment of the term "income" ignores the unique goals and objectives of the AFDC program and the lump sum rule and should be overruled.

Treating personal injury awards as "income" subject to the lump sum rule, while at the same time treating as a resource insurance awards received as a result of damage or destruction to existing personal or real property, does not violate the federal equal treatment regulation. It is not illegal to treat individuals differently when they are in fact in different circumstances. Furthermore, the distinction is sustainable because it advances reasonable and identifiable governmental objectives in a rational fashion.

ARGUMENT

I.

VIRGINIA'S TREATMENT OF PERSONAL INJURY AWARDS AS "INCOME" IS CONSISTENT WITH THE INTENT OF CONGRESS.

A.

The language of 42 U.S.C. § 602(a)(17), its legislative history, and its administrative interpretation all support Virginia's treatment of personal injury awards as "income."

In enacting the lump sum rule, Congress referred to the receipt of "income" throughout, but did not define the term for purposes of the AFDC program. Therefore, in order to determine whether personal injury awards are properly considered "income" for purposes of awarding AFDC benefits, this Court must ascertain the intent of Congress and interpret the AFDC statute accordingly. *United States v. American Trucking Assoc., Inc.*,

310 U.S. 534 (1940). The starting point for determining congressional intent is the language of the statute itself; if the language is ambiguous or unclear, then resort is made to the legislative history.[6] *Blum v. Stenson*, 465 U.S. 886 (1984).

The definition of "income" may vary depending on the context in which it is used. *See Davis v. Coler*, 789 F.2d 474 (7th Cir. 1986). Basically, income is an increase in one's economic power. Money paid to compensate people for personal injuries does increase their economic power. In that fundamental sense, personal injury awards are income. They may be spent, invested, or otherwise used to improve one's position. To the extent that such a payment represents lost wages, past or future, it is not different from the receipt of wages themselves, even though it may be taxed differently.

There is no uniform, accepted definition of "income" that must be read into all statutes regardless of context or intent.[7] Resorting to the dictionary definition of the term "income" to resolve an ambiguity in its meaning is of little value. Such reference provides only a static meaning and fails to take into account the context in which the word is used.[8] As this Court recently acknowledged:

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[6]As this Court has frequently stated, however, "there is wisely no rule of law forbidding resort to explanatory legislative history no matter how clear the words may appear on superficial examination." *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943) (quoting *United States v. American Trucking Assoc., Inc.*, 310 U.S. 534, 543-544 (1940)). Thus, "the plain-meaning rule is 'rather an axiom of experience than a rule of law,'" *Watt v. Alaska*, 451 U.S. 259, 266 (1981), and inquiry into the particular circumstances surrounding the enactment of legislation "may persuade a court that Congress did not intend words of common meaning to have their literal effect." *Id.* at 266.

[7]Even 42 C.J.S. *Income* (1944) cited by the court of appeals for the proposition that income "represents a gain or profit," 747 F.2d at 1274 (Pet. App. 12), states: "Its specific meaning in a particular case is governed by the intent of the parties as deduced from the context, the subject matter of the instrument, and the character of the person, or persons, employing it .... Generally or ordinarily the term means all that comes in ...." 42 C.J.S. *Income* 528, 529 (1944).

[8]"But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (CA2) (L. Hand, J.), *aff'd.* 326 U.S. 404 (1945)." *Watt v. Alaska*, 451 U.S. at 266, n.9.

"[a] word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Regents of the University of California v. Bakke*, 438 U.S. 265, 284 (1978) (quoting *Towne v. Eisner*, 245 U.S. 418, 425 (1918)). The Seventh Circuit's conclusion on this point in a case identical to this is well reasoned: "'Income' is a legal construct rather than an economic truth; there is no natural meaning of a legal construct."[9] *Davis v. Coler*, 789 F.2d at 477. Thus, the Court must look beyond the plain language of the statute in order to ascertain what Congress intended "income" to mean for purposes of the lump sum rule.[10]

The legislative history of the OBRA amendment to 42 U.S.C. § 602(a)(17), the administrative proposal on which the amendment was based, and the administrative interpretation of "income" since its enactment all support the inclusion of personal injury awards in "income" for AFDC purposes. The court of appeals erred in looking beyond the AFDC program to determine what Congress intended "income" to mean. It cited the Internal Revenue Code, the Food Stamp Program, and poverty guidelines promulgated by the U.S. Department of Health and Human Services (DHHS) in support of its finding that personal injury

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[9]In this regard, the word "income" is similar to the word "unemployment." Both are commonly used words. *Batterton v. Francis*, 432 U.S. 416 (1977), involved the interpretation of the term "unemployment" as used in the AFDC statute. This Court recognized that the term was ambiguous and subject to more than one "tautalogical definition" and found that it "is often used in a specialized context where its meaning is other than simply not having a job." *Id.* at 427, 428. The term "income" also is capable of a variety of meanings depending on the context of its use. *See Fullerton v. Central Lincoln People's Utility District*, 185 Or. 28, 32, 201 P.2d 524, 526 (1948) ("The word 'income' is capable of a variety of meanings, depending upon the manner of its use."); *Merrick v. Delavan Engineering Co.*, 243 Iowa 39, 48, 50 N.W.2d 586, 591 (1951) ("Income is a broad and comprehensive term which has been frequently defined by the courts with some variations, depending on the context.").

[10]In *Heckler v. Turner*, 105 S.Ct. 1138 (1985), this Court considered whether mandatory payroll tax deductions are "income" for AFDC purposes. That question, like the question in this case, was generated by statutory changes effected by OBRA. Despite the obvious tax consequences of any definition it might give to the term, rather than relying on the Internal Revenue Code, this Court examined the language of the Social Security Act, the administrative background to the OBRA amendments, and the relevant legislative history in order to ascertain congressional intent. *Id.* at 1144-1147.

awards should not be considered "income" in determining eligibility for AFDC benefits. Such references, however, are misplaced. It is a long settled tenent of statutory construction that statutes are not read *in pari materia* when they do not concern the same subject and serve different objectives. *Northern Pacific Railway Co. v. U.S.*, 156 F.2d 346, 350 (7th Cir. 1946), *aff'd.* 330 U.S. 248 (1947) (The Transportation Act of 1940 is not *in pari materia* with the Embargo Act of 1940, Property Requisitioning Act of 1941, and the National Defense Act of 1941; terms "military and naval property" given broader meaning in Transportation Act); *see also* 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 51.03 (4th Ed. Revision 1984).

The AFDC program is a flexible, highly complex, cooperative federal-state program of public assistance.[11] The purposes of the AFDC program and the Internal Revenue Code are vastly different. The dominant purpose of the tax code is to generate revenue. *Blumenfield v. U.S.*, 306 F.2d 892 (8th Cir. 1962); *see also Helvering v. Horst*, 311 U.S. 112 (1940). The purpose of the AFDC program is to provide financial assistance to needy, dependent children and their resident parents or guardians. *See* 42 U.S.C. § 601. The purpose of the lump sum rule is to reduce or eliminate welfare benefits for those considered by Congress to be less needy because they have available other sources of income or resources with which to support themselves.

There is no specific statutory provision in the AFDC statute excluding personal injury awards from consideration as income as there is in the tax code.[12] The court of appeals' reliance upon the Internal Revenue Code to determine the meaning of income within the AFDC statute is misplaced. If carried to its conclusion, such reliance would lead to a bizarre meaning of the lump sum rule. For example, Section 102 of the Internal Revenue Code excludes gifts and inheritances from inclusion in gross income.

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[11]This Court has previously noted: "The Social Security Act is among the most intricate ever drafted by Congress. Its Byzantine construction, as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.' *Freidman v. Berger*, 547 F.2d 724, 727, n. 7 (CA2 1976), *cert. denied*, 430 U.S. 984 (1977)." *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (footnote omitted).

[12]The exclusion of personal injury awards as income subject to taxation is expressly established by I.R.C. § 104(a)(2).

Under the court of appeals' analysis, an AFDC recipient could receive a large gift of money or receive a sizeable inheritance and remain eligible for AFDC. Such treatment obviously would thwart what Congress and the Administration attempted to achieve and clearly demonstrates the danger of construing similarly terms which appear in statutes that have vastly different purposes and objectives.

Also misplaced is the court of appeals' reliance upon the definition of income in the Food Stamp Program. Once again, as with the Internal Revenue Code, there is a specific exclusion. Retroactive lump sum insurance awards are excluded from the calculation of household income for purposes of the Food Stamp Program pursuant to 7 U.S.C.§ 2014(d)(8). That section reads:

> Household income for purposes of the food stamp program shall include all *income* from whatever source excluding only . . . (8) moneys received in the form of nonrecurring lump sum payments, including, but not limited to . . . retroactive lump-sum insurance settlements . . . . (Emphasis added.)

What the court of appeals overlooked is that, absent such specific congressional exclusion, such payments would be considered income for purposes of this federal aid program. Otherwise, there would be no need for the exclusion. The failure to include a similar exclusion in the language of the lump sum rule clearly indicates Congress intended "income" to be given its broadest reading in that context. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521-522 (1982).

The court of appeals also relied on the fact that, in revising annual poverty income guidelines, DHHS excluded compensation for injury when considering income for eligibility purposes for certain federal programs which use poverty guidelines as eligibility criteria. 48 Fed. Reg. 7010-7011 (Feb. 17, 1983). The court of appeals, however, undertook no examination of the specifics of the programs that use such guidelines, their statutory bases or their purposes. Programs that use such poverty guidelines for eligibility purposes cover such diverse areas as alien employment authorization, 8 C.F.R. § 109.1, discounts to migrant health centers, 42 C.F.R. § 56.303, and eligibility for free legal services, 45 C.F.R. § 1611.3. The objectives of these programs are readily distinguishable from those of the AFDC

program, and, thus, these administrative interpretations provide no basis for determining what Congress intended "income" to mean for AFDC purposes.

B.

The legislative history of 42 U.S.C. § 602(a)(17) and its administrative background and interpretation demonstrate that Congress intended personal injury awards to be considered "income" subject to the lump sum rule.

On May 5, 1981, DHHS Secretary Richard S. Schweiker forwarded the Administration's draft bill proposing the lump sum rule to the Speaker of the House of Representatives, Representative Thomas P. O'Neill. (Pet. App. 90-92). In his cover letter to Speaker O'Neill, Secretary Schweiker indicated that the AFDC amendments proposed would "conserve Federal resources by assuring that State programs concentrate their efforts on families most in need, encourage work, structure State programs as a temporary safety-net rather than a way of life for the indefinite future, emphasize individual responsibility, and improve program administration...." (Pet. App. 90).

Of specific concern to both the Administration and Congress was the fact that nonrecurring lump sum payments had been treated under the former statutes and regulations either as "income" only in the month of receipt or as a resource. For example, a payment which represented an accumulation of "income" received in a single sum, such as an initial OASDI payment, was treated as current income and served to disqualify the recipient only in the month of receipt. (J.A. 55, 56, 58). Thereafter, any amounts remaining unspent were treated as a resource and served to disqualify such individual only if the amount remaining exceeded the resource cut-off level.

At the same time certain other non-recurring payments, such as inheritances, gifts, and insurance settlements, were considered "windfall" payments (J.A. 82) and states were allowed to choose whether to define such payments as income or as a resource. (J.A. 47, 58, 66, 83, 84). If defined as a resource, a windfall payment

would not impact eligibility if, when added to other resources, it did not exceed the state's resource limit. If the windfall payment exceeded the state's resource limit, eligibility could be regained if the money was spent quickly. (J.A. 25). Thus, rather than helping people become self-sufficient and spend their money wisely, treatment of lump sum windfall payments as resources encouraged AFDC recipients to spend such sums quickly in order to regain eligibility.

In the section-by-section summary accompanying the draft bill, Secretary Schweiker specifically mentioned lump sum payments of insurance proceeds as a target of the lump sum rule:

> *Under current law, there is no way to assure that large payments, such as lump-sum payments of insurance proceeds, or retroactive benefit payments,* are considered available to meet current needs over a period of time, even though the family eligibility can be curtailed for the month of receipt. The proposal would specify that *these large payments,* together with other income remaining after application of the disregards, *would be considered as income* in the month of receipt and that the family would be ineligible for the number of months obtained by dividing all that month's countable income by the applicable standard. (Emphasis added.) (Pet. App. 93).

It is important to note that, in describing the Administration's proposal, the Secretary did not refer only to lump sums which met some preconceived definition of income. The Secretary spoke in terms of large payments, giving several examples, and then stated that "these large payments" would be considered income available to meet the family's needs over a period of time.

The Administration consistently described its proposal in terms of the receipt of a "large amount of money" or "large payments" including payments generally not defined as income for tax purposes such as insurance proceeds, inheritances, and retroactive benefit payments. On several occasions when Secretary Schweiker communicated with congressional committees, he described his proposal in similar language:

> We are also introducing proposals to insure that people assume more personal responsibility for planning the use of income to meet their needs.
>
> When *a large amount of money* is received as a lump sum, *for example, an inheritance,* we will *consider it as income available* for support not only in the month it is received, but to meet needs over a period of time. (Emphasis added.)

Spending Reduction Proposals: Hearings on Administration's Spending Reduction Proposals Before the Senate Comm. on Finance, 97th Cong., 1st Sess. 18 (1981) (statement of Richard S. Schweiker, Secretary, U.S. Dept. of Health and Human Services). (J.A. 53, 54).[13]

Not only did Congress enact § 402(a)(17) of the Act using the same language that the Administration submitted in § 104 of the draft bill, but the relevant congressional committees also reflected an understanding of the purpose and scope of the Administration's proposal. The House Ways and Means Committee, in a staff report, summarized the proposal by stating:

> *AFDC Proposal 13: averaging unearned income received as a lump-sum payment.*
>
> *Background:*
>
> According to DHHS, lump-sum payments that meet the definition of income, such as retroactive Social Security payments, now are counted as income in the month when received, and, if an excess remains, as resources thereafter.
>
> *Proposed Change:*
>
> Require States to *consider all lump-sum payments as income available to meet a family's needs.* The

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[13] *Id.* at 33 (J.A. 74); *See also Administration's Proposed Savings in Social Security Program: Hearings on the Administration's Proposed Savings in the Unemployment Compensation, Public Assistance and Social Service Programs Before the Sub. Comm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means,* 97th Cong., 1st Sess. 12 (1981) (statement of Richard S. Schweiker, Secretary, U.S. Dept. of Health and Human Services) (J.A. 64).

> household would be ineligible for AFDC if a lump-sum payment exceeded the standard of need. Any excess sum in the month when received would be carried forward for later use. (Emphasis added.)

STAFF OF HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., DESCRIPTION OF THE ADMINISTRATION'S LEGISLATIVE RECOMMENDATIONS UNDER THE JURISDICTION OF THE WAYS AND MEANS COMMITTEE 58 (Comm. Print 1981) (Brief App. 24-25).

The House Committee provided further explanation of the rationale and effects of the proposal:

> *Rationale*
>
> All income available to recipients of AFDC should be taken into account in determining benefit amounts and continued eligibility. This proposal will eliminate the disincentive for recipients to budget lump-sum amounts over a period of time while encouraging the use of these payments to meet basic needs.
>
> *Effects*
>
> This proposal will reduce or eliminate AFDC benefit payments to recipients receiving lump-sum amounts for the subsequent months in which the prorated lump-sum amount exceeds the state's AFDC needs standard.

STAFF OF HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., TAX ASPECTS OF THE PRESIDENT'S ECONOMIC PROGRAM, 265-266 (Comm. Print 1981) (J.A. 75-76).

In its recommendation to the Budget Committee on OBRA, the Senate Finance Committee summarized the lump sum proposal by stating:

> Under present law, any payments that meet the definition of income (*e.g.*, retroactive social security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered a resource in the months thereafter.

> The committee amendment would require that *large payments*, together with other income remaining after the application of disregards, *be considered available to meet ongoing needs* in the AFDC program.... (Emphasis added.)

S. REP. NO. 139, 97th Cong., 1st Sess. 436, *reprinted in* 1981 U.S. CODE CONG. AND AD. NEWS 396, 702. (J.A. 24).

It is these two sentences of the Senate Finance Committee's recommendation that the court of appeals said unmistakably revealed Congress' intent to restrict the application of the lump sum rule to those payments that ordinarily would be considered "income." 774 F.2d at 1275. (Pet. App. 15). Nothing in the Committee report departs, however, from Secretary Schweiker's own description in his section-by-section summary submitted with the draft bill to Speaker O'Neill. *Supra* at p. 13. Indeed, comparison of the two sentences in the Senate Finance Committee Report to the two sentences of Secretary Schweiker's summary reveals that they are remarkably similar in both content and structure. In each statement, the first sentence is a statement of current law.[14] The second sentence in both is a statement of what was intended to be changed. Secretary Schweiker refers to "*these large payments*, together with other income remaining after the application of the disregards," referring to his examples of lump sum payments of insurance proceeeds or retroactive benefit payments. The Senate Finance Committee Report merely states "large payments, together with other income remaining after the application of disregards."

The foregoing legislative history and administrative background reveal that Congress enacted the lump sum rule using the same language proposed by Secretary Schweiker. The Secretary clearly indicated to Congress that lump sum payments of insurance proceeds were to be considered an "income" subject to the rule. The responsible congressional committees understood the rule as proposed, using language remarkably similar to the Secretary's to describe the proposal. Congress indicated no disagreement with the proposal as described by the Secretary and

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[14]The use of the phrase "any payment that meets the definition of income" reflects an understanding of the longstanding DHHS policy whereby states were given freedom to define certain "windfall" payments, such as inheritances and insurance awards, as "income" or a resource. If defined by the state as "income", then such payments were counted as "income" only in the month of receipt and, thereafter, as a resource as described by the Committee.

added no qualifications or exclusions. It must, therefore, be accepted that Congress intended the lump sum rule to apply to all large payments including personal injury awards and inheritances as well as retroactive social security benefits and other payments that meet some narrower definition of "income."

The overall objective of the OBRA amendments was to reduce the growth of federal expenditures "in order to wage an effective battle against the high inflation and unemployment which have plagued the national economy for many years." S. REP. NO. 139, 97th Cong., 1st Sess. 3, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 396, 398. The changes made in the AFDC program by OBRA were intended, in part, to fulfill this objective.[15] The

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[15]In testifying before the Budget Committee of the House of Representatives prior to the actual submission of the Administration's draft bill proposing spending cuts and program restructuring for the AFDC program, Secretary Schweiker declared:

> This budget is an essential part of the President's program for economic recovery....
>
> For this program to succeed, budget control is essential. The excessive past rates of increase in federal outlays have inhibited economic growth, raised the Nation's real tax burden, diverted resources from more productive private uses, and discouraged production and investment....
>
> A major legislative initiative is being proposed for the AFDC program to better target welfare assistance on those most in need, to reduce incentives for those remaining on assistance and to improve program management.... [The social welfare program changes] will result in an estimated $1.0 billion in Federal savings in 1982 growing to $1.3 billion by 1986.

Budget Issues for Fiscal Year 1982: Hearings to Consider Reagan Administration FY 1982 Spending Reduction Proposals Before the House Comm. on Budget, 97th Cong., 1st Sess. 226, 227, 238 (1981) (statement of Richard S. Schweiker, Secretary of U.S. Dept. of Health and Human Services) (J.A. 72). *See also Tax Aspects of the President's Economic Program: Hearings on the Administration's Economic Program Before the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 156, 158, 160 (1981) (statement of Richard S. Schweiker, Secretary, U.S. Dept. of Health and Human Services) (J.A. 70).

OBRA effected changes in AFDC also were intended to serve certain welfare policy goals.[16]

If personal injury awards were excluded from the lump sum rule, the fiscal restraint and welfare policy objectives of Congress and the Administration would be defeated. Lump sums would not be budgeted to meet basic needs in lieu of relying on AFDC; recipients would be encouraged to spend the money quickly on consumer products or nonessential activities in order to retain or regain AFDC eligibility; and scarce public assistance dollars would be diverted from those who have no other means of support.

The DHHS confirmed the validity of Virginia's interpretation of 42 U.S.C. § 602(a)(17), when it issued its final rule regarding the treatment of lump sum payments. 51 Fed. Reg. 9191, 9205 (1986) (to be codified in 45 C.F.R. § 233.20(a)(3)(ii)(F)) (J.A. 86). Brief App. 23). Recognizing that personal injury awards were the very type of payments Congress intended to be treated as "income" and used to meet the family's future needs, DHHS now

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[16]In a prepared statement submitted to the relevant Senate and House Committees, Secretary Schweiker outlined these goals:

> Our next set of proposals is aimed at assuring that the AFDC program is available only as a temporary program to assist families with children who have no other means of support. Before the first dollar of aid is paid, all other sources of income should be pursued and all available income counted....
>
> *Emphasizing individual responsibility*
>
> We are also introducing proposals to ensure that people assume more personal responsibility for planning the use of income to meet their needs. When a large amount of money is received as a lump sum, for example, an inheritance, we will consider it as income available for support not only in the month it is received but to meet future needs.

Spending Reduction Proposals: Hearings on Administration's Spending Reduction Proposals Before the Senate Comm. on Finance, 97th Cong., 1st Sess. 33 (1981) (statement of Richard S. Schweiker, Secretary, U.S. Dept. of Health and Human Services) (J.A. 74). *See also Administration's Proposed Savings in Social Security Program: Hearings on the Administration's Proposed Savings in the Unemployment Compensation, Public Assistance and Social Service Programs Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 12 (1981) (statement of Richard S. Schweiker, Secretary, U.S. Dept. of Health and Human Services) (J.A. 64).

has *required* states to treat such payments as "income" from a nonrecurring source subject to the lump sum rule.[17]

II.

TREATMENT OF PERSONAL INJURY AWARD AS "INCOME" SUBJECT TO THE LUMP SUM RULE DOES NOT VIOLATE 45 C.F.R. § 233.10(a)(1) (THE EQUITABLE TREATMENT REGULATION)

Virginia requires recipients who receive personal injury awards to use such monies in lieu of AFDC benefits to meet current living expenses. Virginia does not require recipients who own an allowable resource, and who either sell that resource or lose it to fire or other casualty, to spend the monies from the sale or any insurance proceeds to meet current living expenses. Such monies are treated as a resource, not subject to the lump sum rule. (J.A. 25). The court of appeals found this treatment of these two classes of recipients inequitable and arbitrary and in violation of the equitable treatment rule incorporated in the AFDC program regulation.[18]

While this case involves the application of the equitable treatment regulation and not the equal protection clause of the Fourteenth Amendment, the standard of review under the equal protection clause provides a useful reference point for analyzing

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[17]51 Fed. Reg. at 9205. "States must disregard from the lump sum payment any amount that is earmarked for the purpose for which it is paid, *i.e.*, monies for back medical bills resulting from accidents or injury, funeral or burial costs, replacement or repair of resources etc.." *Id.* at 9197. (J.A. 84).

[18]The court of appeals also found it inequitable that Virginia limited the offset of expenses related to the award to those expenses incurred within thirty days of receipt of the award. This point, however, has been mooted by the implementation by Virginia of changes that were made to the Social Security Act by the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2632(a), 98 Stat. 494, 1141. *See Kremens v. Bartley*, 431 U.S. 119 (1977). DHHS regulations now permit the reduction of a lump sum when an individual uses the money to pay for certain expenses regardless of when incurred. 51 Fed. Reg. at 9197 (J.A. 84).

Even without such change, Virginia's former policy of limiting the offset of expenses to those incurred prior to and within thirty days of the receipt of the award was a rational way of responding to the obvious fact that future expenses are impossible to predict with any degree of precision.

the regulation. It is well settled "that the equal protection clause does not forbid discrimination with respect to things that are different," *Puget Sound Co. v. Seattle*, 291 U.S. 619, 624 (1934), and the situations in which these two classes of recipients find themselves clearly are different. The lump sum rule precludes the *acquisition* of new resources with funds that could be used to meet current necessary living expenses. Certainly that is different from permitting members of a household to *retain* certain resources they possessed when they applied for AFDC, even if they lose one of these resources and choose not be replace it.

Even if the situations of the two classes of recipients were not different, however, the absence of perfect equality between them is sustainable. The application of the lump sum rule involves economic issues and questions of social welfare policy and does not affect freedoms guaranteed by the Bill of Rights, nor is the distinction it creates inherently invidious. *Dandridge v. Williams*, 397 U.S. 471 (1970). Using the constitutional standard, Virginia's application of the lump sum rule must be upheld under the equitable treatment rule if it advances legitimate governmental objectives in a rational fashion. *Id.; Schweiker v. Wilson*, 450 U.S. 221 (1981); *Jefferson v. Hackney*, 406 U.S. 535 (1972).[19]

In this case, Virginia has advanced both legitimate governmental goals and a rational basis for the application of the lump sum rule. Application of the lump sum rule to personal injury awards by Virginia focuses scarce public assistance funds on those who need them most, eliminates the perverse disincentive that encourages quick depletion of the lump sum in

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[19]In *Schweiker*, this Court held:

> Thus, the pertinent inquiry is whether the classification...advances legitimate legislative goals in a rational fashion....[This standard] does not allow us to substitute our personal notions of good public policy for those of Congress:
>
> > In the area of economics and social welfare, a State does not violate the Equal Protection Clause ... merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequity."

Schweiker v. Wilson, 450 U.S. at 234.

order to regain eligibility, and reduces spending. This is certainly a legitimate governmental objective.

The distinction made between individuals in households that are permitted to retain resources already held and those that are precluded from acquiring new resources with the proceeds of a lump sum payment is not an irrational one. In fact, individuals in both households are treated equally insofar as possible, in that they are given the opportunity to remedy, replace or repair the injury or damage for which the lump sum is received. For the recipient of a personal injury award, medical and legal expenses related to the award are deducted and the remainder of the lump sum is considered available to meet the family's living expenses. In the case of a property damage award, it is assumed the money will be spent to replace the resource. The possibility that someone might not actually repair or replace damaged personal or real property for which he recovers compensation may be an imperfection, but the court of appeals' decision improperly demands mathematical equality. As long as the classification chosen "advances a reasonable and identifiable governmental objective," *Schweiker v. Wilson*, 450 U.S. at 235, courts must disregard the existence of alternative methods of classification that they might, as individuals, prefer. *Id. See also Jefferson v. Hackney*, 406 U.S. at 546.

CONCLUSION

Both the Administration and Congress used the word "income" within the lump sum rule with the intent that it be given a broad meaning to include nonrecurring payments of inheritances, gifts, social security benefits and personal injury awards. Any restriction of the term to a narrower meaning would defeat the important goals of encouraging individual responsibility and retargeting benefits to those most in need which Congress and the Administration attempted to achieve. Under established rules of statutory construction, the intent of Congress must be given effect.

Additionally, the application of the lump sum rule to personal injury awards while permitting property insurance awards to be treated as a resource does not violate the equal treatment regulation. Similarly situated individuals are treated equally under Virginia's rule. Even if an inequality does exist, the application of the rule advances legitimate governmental goals in a rational fashion. That is all the standards set by this Court require.

Accordingly, the judgment of the court of appeals below was erroneous and should be reversed.

Respectfully submitted,

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August 7, 1986

BRIEF APPENDIX 1

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PART 233 OF CHAPTER II, TITLE 45 CODE OF FEDERAL REGULATIONS § 233.20(F)

§ 233.20 Need and amount of assistance.

(a)***
(3)***
(ii)***

(F) When the AFDC assistance unit's income, after applying applicable disregards, exceeds the state need standard for the family because of receipt of nonrecurring earned or unearned lump sum income (including for AFDC), title II and other retroactive monthly benefits, and payments in the nature of a windfall, *e.g.*, inheritances or lottery winnings, personal injury and worker compensation awards, to the extent it is not earmarked and used for the purpose for which it is paid, *i.e.*, monies for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair of resources, etc. the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility. The period of ineligibility shall begin with the month of receipt of the nonrecurring income or, at State option, as late as the corresponding payment month.***

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BRIEF APPENDIX 2

U.S. CONGRESS, HOUSE COMMITTEE ON WAYS & MEANS, "DESCRIPTION OF THE ADMINISTRATION'S LEGISLATIVE RECOMMENDATIONS UNDER THE JURISDICTION OF THE WAYS & MEANS COMMITTEE," 97-1, MARCH 18, 1981.

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Section 5. Aid to Families with Dependent Children (AFDC)

Summary

President Reagan's FY82 budget of March 10, 1981 contains a dozen legislative proposals for AFDC that it estimates would cut benefit outlays that year by almost $1 billion. This is double the savings contemplated from the administration's February 18 package of five proposals, all of which appeared in the original FY82 budget of the Carter administration.

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Details of AFDC Proposals

The March 10 budget contains, in all, some 21 AFDC proposals, plus 5 dealing with child support enforcement; but only 12 of the AFDC proposals are credited with FY82 budget savings.

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AFDC Proposal 13: Averaging unearned income received as a lump-sum payment.

Background:

According to DHHS, lump-sum payments that meet the definition of income, such as retroactive Social Security payments, now are counted as income in the month when received, and, if an excess remains, as resources thereafter.

Proposed Change:

Require States to consider all lump-sum payments as income available to meet a family's needs. The household would be ineligible for AFDC if a lump-sum payment exceeded the standard of need. Any excess sum in the month when received would be carried forward for later use.

Impact:

DHHS estimates that the proposal would remove 5,000 families from AFDC, reducing Federal AFDC benefit outlays by $5 million in FY82 and yielding negligible administrative savings. However, it would boost food stamp benefits by an estimated $2 million. Thus, net savings would be $3 million.

(1)

No. 85-1358

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, PETITIONER

v.

ONA MAE REED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES AS RESPONDENT SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Social Security Act requires that lump-sum personal injury awards be treated as "resources," rather than as "income," for purposes of computing eligibility for an amount of AFDC benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet: App. 1-22) is reported at 774 F.2d 1270. The opinion of the district court on summary judgment (Pet. App. 23-51) is reported at 591 F. Supp. 1247. The opinion of the district court on preliminary injunction is reported at 578 F. Supp. 40.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1985. A petition for rehearing was denied on November 14, 1985 (Pet. App. 55-57). The petition for a writ of certiorari was filed on February 11, 1986, and was granted on June 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 402(a)(17) of the Social Security Act, 42 U.S.C. 602(a)(17), states, in pertinent part:

> [A state AFDC plan must] provide that if a person * * * receives in any month an amount of income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member—
>
> (A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and
>
> (B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A).

45 C.F.R. 233.20(a)(3)(ii)(F) provides, in pertinent part:

> When the AFDC assistance unit's income, after applying applicable disregards, exceeds the State need standard for the family because of receipt of nonrecurring earned or unearned lump sum income [including for AFDC, title II and other retroactive monthly benefits and payments in the nature of a windfall, *e.g.*, inheritances or lottery winnings, personal injury and worker compensation awards, to the extent it is not earmarked and used for the purpose for which it is paid, *i.e.*, monies for back medical bills resulting from accidents or injury, funeral and burial costs, replacement or repair of resources, etc.],

the family will be ineligible for aid for the full number of months derived by dividing the sum of the lump sum income and other income by the monthly need standard for a family of that size. Any income remaining from this calculation is income in the first month following the period of ineligibility.

STATEMENT

The Aid to Families with Dependent Children (AFDC) part of the Social Security Act (Title IV, Part A of the Act, 42 U.S.C. 601 *et seq.*) establishes a cooperative federal-state assistance program. Participating states provide financial support to needy dependent children and the persons who care for them, and the federal government partially reimburses the states for the expenses they thereby incur. The AFDC program is designed to "encourag[e] the care of dependent children in their own homes * * * and to help [those children's] parents or relatives to attain or retain capability for the maximum self-support and personal independence * * *" (42 U.S.C. 601).

States participate in the AFDC program at their option and, at the present time, all states have chosen to do so. Accordingly, each state has formulated and administers an assistance plan that conforms with the requirements of the statute and the implementing rules and regulations of the Secretary of Health and Human Services (Secretary). See 42 U.S.C. 602(a); see generally 45 C.F.R. 201.0 *et seq.* In conformity with these requirements, each state has established a statewide standard of need, "which is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974). Furthermore, each state has specified "how much assistance will be given, that is, what 'level of benefits' will be paid." *Rosado* v. *Wyman*, 397 U.S. 397, 408 (1970). And, in administering its assistance plan, each state distinguishes between a

family's "resources" and its "income": If the family's "resources" or "income" in a given month exceeds state-specified limits (subject to federally prescribed maximums), the state cannot provide the family with AFDC benefits that month. See 42 U.S.C. 602(a)(7)(B), 602(a)(17), 602(a)(18). The maximum figure for "resources" generally exceeds that for "income."

The statute requires the states to exempt certain assets and monetary receipts from these "resources" and "income" calculations. For example, the state must "exclude" from a family's countable "resources" the family home, an automobile (up to $1,500 in value), and, at the state's option, certain items deemed essential to daily living. See 42 U.S.C. 602(a)(7)(B)-(C); 45 C.F.R. 233.20(a)(3)(i). Likewise, the state must "disregard" certain earnings of AFDC family members and relatives in determining a family's countable "income." See 42 U.S.C. 602(a)(8)(A), 602(a)(31). However, the statute does not otherwise assist the states in distinguishing between "resources" and "income" for AFDC benefit eligibility determinations.

2. Prior to 1981, the states were required to treat all "income" or "resources" received in one month as "resources" in succeeding months—until the money was spent. This, however, had an anomalous effect on any family that received a nonrecurring lump sum payment (*e.g.*, a retroactive social security payment, an inheritance, a lottery winning, etc.). The family had to spend the lump sum receipt as quickly as possible or face potential disqualification from AFDC benefits (because their "resources" might exceed allowable limits). Thus, though the statute was designed to encourage AFDC families to budget their money responsibly, its treatment of lump sum receipts had the opposite effect.

Accordingly, in 1981, the Secretary recommended that Congress amend the statute's treatment of lump sum receipts. See Letter to the Speaker of the House of

Representatives (May 5, 1981) and Attached Excerpt of the Section by Section Summary, Social Welfare Amendments of 1981 (Pet. App. 90-93). Specifically, the Secretary proposed that the states be required to prorate that part of a family's income which exceeds the state's monthly standard of need over a period of months—determined by dividing all lump sum receipts and other countable income by the applicable monthly need standard. See *id.* at 93. Congress concurred in the Secretary's suggestion and, in the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 845, enacted into law the Secretary's proposed proration requirement. See 42 U.S.C. 602(a)(17). The effect of the amendment was and still is, with exceptions not relevant here, to render a family that receives a substantial lump sum income payment ineligible for AFDC benefits for several months, even if the family dissipates that lump sum before the ineligibility period has expired.

3. The Secretary subsequently published rules to implement the new statutory proration requirement. See 47 Fed. Reg. 5648, 5675 (1982). In doing so, the Secretary noted that Congress had not specified that any change be made in the states' existing practices in defining "income." See *id.* at 5656. Accordingly, the Secretary observed, states could and should continue to exclude from "income" all lump sum monies earmarked and used for a specific purpose, such as the payment of medical bills. See *id.* at 5656.

Two years later, in another rulemaking proposal, the Secretary noted that some states were treating other "payments [that] Congress [had] intended [to] be counted and used to meet the family's future needs * * *" as resources, rather than as income. 49 Fed. Reg. 45558, 45561 (1984). The Secretary acknowledged that he had in the past permitted the states to treat some lump sum receipts as either "income" or "resources." See *id.* at 45561. But he

proposed that, under the 1981 statutory proration requirement, all states henceforth treat "all lump sum payments * * * as income under the AFDC program," unless "otherwise disregarded" by the statute or its implementing regulations. *Ibid.*

The Secretary received numerous comments concerning this proposal. See 51 Fed. Reg. 9196, 9197 (1986) (summarizing comments). Some commentators reminded the Secretary that, in enacting the OBRA, Congress had only "meant to change the methodology applicable to lump sum income[,] * * * not the definition of lump sum income" (*id.* at 9197). Thus, they argued that non-recurring lump sum awards, such as workers' compensation payments and personal injury settlements, had to be treated as "resources," and not as "income," of the AFDC family. *Ibid.* The Secretary responded that "some states have always considered such payments as income [and thus] there was no specific definition of lump sum income that * * * Congress [could have] intended to maintain." *Ibid.* Accordingly, he concluded that, "[g]iven the Congress' clear intent to have lump sums * * * used to meet future needs, States should not be allowed to exclude [lump sum receipts, such as personal injury and workers' compensation awards,] by calling them resources." *Ibid.* He then adopted a rule to that effect. See *id.* at 9205 (to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F) (reproduced at page 2, *supra*).

4. In 1983, well before the Secretary had initiated the latter rulemaking proceedings, three of the private respondents filed this class action. 578 F. Supp. 40 (W.D. Va.). Each had received a personal injury or workers' compensation award and had been held ineligible for AFDC benefits. *Id.* at 41-42. The Commissioner of the Virginia Department of Social Services (Commissioner) had elected to treat their personal injury and workers' compensation awards as "income" and, applying the new statutory proration requirement, had determined that their prorated in-

comes were above the state's monthly need standard. *Ibid.* Respondents objected to the Commissioner's treatment of their personal injury and workers' compensation awards and asked the district court immediately to restore their AFDC benefits. *Ibid.* The district court granted the three respondents' motion for preliminary injunctive relief, but denied their accompanying request for class-wide preliminary relief. *Id.* at 45.

The district court subsequently certified the requested class and granted summary judgment in its favor (Pet. App. 23-51). The court agreed with the respondent class that, in enacting the proration requirement, Congress had not directed that all lump sums be treated as "income" (*id.* at 45-46). Relying primarily on dictionaries and the Internal Revenue Code, the court ruled that personal injury awards do not fit within the ordinary meaning of the term "income" and therefore are not among those lump sum receipts to which Congress had intended the proration requirement to apply. *Id.* at 41-51. Accordingly, the court held that the Commissioner and the Secretary had erred in denying benefits to the respondent class.

In October 1985, approximately five months before the final regulations were issued in the then-pending rulemaking proceedings, the court of appeals affirmed the judgment of the district court (Pet. App. 1-22). The court agreed with the district court that personal injury awards are not "income" within the ordinary meaning of that term. In the court's view, persons receive "income" only when they make a "profit or gain," and persons receiving personal injury awards make no such profit or gain (*id.* at 12). The court found nothing in the legislative history of the 1981 amendment to convince it that Congress had intended to depart from this conception of the term "income" (*id.* at 14-15). Finally, the court held that the Secretary's and the state's treatment of casualty loss

awards as "resources" and their treatment of personal injury and workers' compensation awards as "income" to be inequitable and unreasonable (*id.* at 15-16).

SUMMARY OF ARGUMENT

The court of appeals erred in overturning the Secretary's judgment that personal injury and workers' compensation awards may (and, indeed, should) be treated as "income" when computing a family's eligibility for and amount of AFDC benefits. The Secretary's interpretation gives reasonable content to the term "income" and promotes the policies underlying the proration requirement enacted by Congress in 1981. Congress adopted that proration requirement to encourage AFDC families to become self-sufficient and to reduce the costs of the AFDC program. Treating personal injury and workers' compensation awards as lump sum income subject to proration furthers these congressional goals. Therefore, in the absence of clear legislative intent to the contrary, the Secretary can reasonably require their proration.

Congress has expressed no contrary intent. While the statute does not define the term "income," its language indicates that Congress intended the term to reach all receipts that a family can use to support itself. Similarly, the statute's structure indicates that Congress intended to limit the payments that can be excluded from the benefit eligibility calculation; Congress specifically identified which monetary receipts the states must "disregard" in calculating an AFDC family's income. Significantly, personal injury and workers' compensation awards are not among them. The Secretary thus acts consistently with the sense of the statutory scheme in refusing to treat them as excludable from "income." The legislative history of the 1981 amendment fully supports this view: in enacting the proration requirement proposed by the Secretary, Congress did not prescribe any restriction on the lump sum

payments that the Secretary can include within the definition of "income." Indeed, since the Secretary has traditionally permitted the states to treat personal injury and workers' compensation awards as "income," Congress should be considered to have approved that settled practice in 1981 and thereby to have provided the catalyst for the Secretary's determination to require the states uniformly to treat personal injury and workers' compensation awards as "income." Given the Secretary's significant role in the drafting and discussion of the 1981 amendment, his interpretation of its use of the term "income" is entitled to particular deference.

The court of appeals' reasons for not deferring to the Secretary's interpretation of the term "income" are unfounded. The court's suggestion that personal injury and workers' compensation awards are not "income" because they do not produce "gain or profit" is erroneous: This Court has clearly indicated that gain or profit is not a *sine qua non* of "income" under the AFDC program (and, indeed, has contrasted the Act's use of that term with its use of the narrower term "earned income" in other provisions). *Heckler* v. *Turner*, No. 83-1097 (Feb. 27, 1985). Similarly, the court of appeals' reasoning that the definition of "income" in the Internal Revenue Code is inconsistent with the Secretary's definition of "income" under the AFDC program is both in error and irrelevant: The Internal Revenue Code broadly defines "income" and then specifically excludes personal injury and workers' compensation awards from that broad definition. The AFDC statute, by contrast, contains no such express exclusion and uses the term "income" for an entirely different purpose than does the Internal Revenue Code. Finally, the court of appeals' view that casualty loss and personal injury awards cannot equitably be treated differently is a moot point. The Secretary's new regulation requires the states to treat casualty loss and personal injury

loss awards similarly: Both are now treated as "income" subject to proration to the extent they are not earmarked and used for a specific purpose. Accordingly, there is no basis for sustaining the court of appeals' judgment barring the Secretary and the states from treating personal injury and workers' compensation awards as proratable "income" under the AFDC program.

ARGUMENT

THE STATUTE DOES NOT REQUIRE THE SECRETARY AND THE STATES TO TREAT LUMP-SUM PERSONAL INJURY AWARDS AS "RESOURCES," RATHER THAN AS "INCOME," WHEN COMPUTING A FAMILY'S ELIGIBILITY FOR AND AMOUNT OF AFDC BENEFITS

This case is governed by well-settled principles of statutory construction: A reasonable interpretation of a statute by the agency that Congress has entrusted to administer it is entitled to be enforced. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984); *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 423 (1983); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). A court is not free to overturn an agency's interpretation simply because the court may prefer a different one, or because reasonable persons may differ as to the statute's meaning. *Chevron U.S.A. Inc.*, 467 U.S. at 843 & n.11. Rather, so long as the agency has reasonably sought to implement the statute in a manner that Congress had not proscribed, its interpretation must be upheld. See *Atkins* v. *Rivera*, No. 85-632 (June 23, 1986), slip op. 7; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10, 17; *Chevron U.S.A. Inc.*, 467 U.S. at 843-845 & nn. 11-14; *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977). Under that view, the Secretary's interpretation of the term "income" in the AFDC program should be sustained.

A. The Secretary's Interpretation Of The Term "Income" Reasonably Implements The Policies Of The Proration Requirement

The Social Security Act provides that, in determining a family's need under the AFDC program, a state plan shall, "except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, * * * take into consideration any other income and resources" of the specified members of a family unit (42 U.S.C. 602(a)(7)(A)). In 1981, Congress added the requirement that the states must prorate the "amount of income which, together with all other income for that month not [expressly required to be disregarded by the statute], exceeds the State's standard of need * * * *" (42 U.S.C. 602(a)(17)). Since the Secretary's treatment of personal injury and workers' compensation awards promotes the policies underlying these provisions, it is a reasonable interpretation of the term "income."

That a state plan must take account of all species of income of an AFDC family reflects Congress' long-considered judgment that AFDC funds should be a source of last resort for the support of AFDC families. See *Shea* v *Vialpando*, 416 U.S. at 261; see also 42 U.S.C. 601. Thus, in 1981, Congress was specifically troubled to learn that the then "present treatment of [lump sum] payments ha[d] the perverse effect of encouraging the family to spend such income as quickly as possible in order to retain AFDC eligibility." S. Rep. 97-139, 97th Cong., 1st Sess. 505 (1981) (Budget Committee Report). Congress agreed with the Secretary that treating lump sum payments in this fashion was adding unnecessarily to the program's burgeoning cost (see *id.* at 505, 553) and undermining the statute's goal of helping AFDC families "attain or retain capability for * * * maximum self-support and personal independence * * *" (42 U.S.C. 601). It therefore enacted the proration requirement precisely "to promote responsible budgeting of lump-sum income by all AFDC families and to reduce AFDC disbursements * * *" (*Sweeney* v.

Murray, 732 F.2d 1022, 1027 (1st Cir. 1984); see also House Comm. on Ways and Means, 97th Cong., 1st Sess., *Tax Aspects of the President's Economic Program*, 265 (1981) ("This proposal will eliminate the disincentive for recipients to budget lump-sum amounts over a period of time while encouraging the use of these payments to meet basic needs")).

The Secretary's determination to allow (and now to require) states to treat personal injury and workers' compensation awards as "income" is fully consonant with, and in furtherance of, these long-standing and recently reaffirmed congressional goals. Accord, *Watkins* v. *Blinzinger*, 789 F.2d 474 (7th Cir. 1986); *Jackson* v. *Guissinger*, 589 F. Supp. 1288 (W.D. La. 1984); *Coakley* v. *Sunn*, No. 85-1233 (D. Hawaii Apr. 2, 1986). Personal injury and workers' compensation awards are not among those receipts that the state can statutorily "exclude" from an AFDC family's "resources." Thus, if personal injury or workers' compensation awards are not treated as "income" as they are received by the family, but nevertheless are added to the family's "resources," the AFDC family would have the same "perverse" incentive that Congress sought to eliminate by enacting the proration requirement—*i.e.*, the incentive quickly to dissipate the resource in order to ensure that they can continue to receive AFDC benefits. The Secretary's treatment of such awards as "income" subject to proration removes that incentive (and, not incidentally, lowers the cost of the AFDC program). See *Watkins* v. *Blinzinger*, 789 F.2d at 479; *Littlefield* v. *State, Department of Human Services*, 480 A.2d 731 (Me. 1984). Absent a clear indication of contrary congressional intent, that is an interpretation the Secretary is entitled to adopt. See *Udall* v. *Tallman*, 380 U.S. at 316.

B. The Secretary's Interpretation Is Entirely Consistent With The Language, Structure, And Legislative History of the Act

Congress has expressed no such contrary intent. The language, structure, and the legislative history of the statute fully support the Secretary's conclusion that personal injury and workers' compensation awards can (and should) be treated as "income" for AFDC purposes.

The Act does not expressly define the term "income" or exhaustively list categories of monetary receipts that must be *included* within it. But the Act does provide that the states must take into account "*any* other income and resources" of the family (42 U.S.C. 602(a)(7) (emphasis added). That language suggests that Congress intended the concepts of "income" and "resources" to be given broad scope. Congress used these terms in the statute to ensure that only "needy" families would receive AFDC support. See *Shea* v. *Vialpando*, 416 U.S. at 261. Thus, the most sensible reconciliation of the two terms is the one that best encourages a family to budget its income and resources to take care of itself. As noted above, the Secretary's treatment of personal injury and workers' compensation awards gives the statutory language this congressionally intended effect.

The structure of the statutory scheme reinforces this view. The Act identifies on its face categories of monetary receipts that must be *excluded* from an "income" calculation. See 42 U.S.C. 602(a)(8)(A) and (31). These exclusions reflect a considered judgment by Congress that certain kinds of receipts should not be regarded as funds available to meet a recipient family's monthly needs. Rather, Congress has determined that these receipts should be deemed precommitted to other uses. Significantly, personal injury and workers' compensation awards are not among the monetary receipts that Congress has indicated must be excluded. The Secretary, therefore, has reasonably concluded, in keeping with the statute's overall

benefit eligibility scheme, that such awards, to the extent that they too are not precommitted to other uses, should be deemed available to meet a family's monthly needs.[1] See *Heckler* v. *Turner*, No. 83-1097 (Feb. 27, 1985), slip op. 8-10; see generally *Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-617 (1980).

The legislative history of the 1981 amendment to the AFDC program fully supports this view. When the Secretary proposed the proration requirement to Congress, he indicated that it would "specify that * * * large payments [such as insurance proceeds or retroactive benefit payments,] together with other income remaining after application of the disregards, would be considered as income in the month of receipt * * *" (Section-by-Section Summary, Social Welfare Amendments of 1981, attached to Letter from Secretary Richard S. Schweiker to Speaker Thomas P. O'Neill, dated May 5, 1981) (Pet. App. 93). The Senate adopted the Secretary's language in light of a staff report explaining that his proposal would "[r]equire that large payments, together with other income remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program." Staff of Senate Committee on Finance, 97th Cong., 1st Sess., *Proposals for Reductions in Spending Programs Under the Jurisdiction of the Senate Finance Committee* 33 (Comm. Print 1981); see also S. Rep. 97-139, *supra*, at 505. The House similarly understood that the Secretary's proposal would "[r]equire States to consider *all* lump-sum payments as income available to meet a family's needs." See Staff of House Committee on Ways and Means, 97th Cong., 1st Sess., *Description of the Administration's Legislative Recommendations Under the Jurisdiction of the Ways and Means Comm.* 53 (Comm. Print 1981) (emphasis added). Thus, as the Seventh Circuit recently noted after

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[1] That is, of course, the effect of the Secretary's current regulation (set forth at page 2, *supra*).

thoroughly reviewing this legislative history, Congress did not "prescribe any restriction" on the lump sum payments that the Secretary can include within the definition of "income." *Watkins* v. *Blinzinger*, 789 F.2d 474, 480 (1986); App., *infra*, 12a.[2]

To be sure, neither the language of the proration requirement nor its legislative history indicates that Congress intended to change the meaning of "income" in 1981. But, as the Secretary noted in the rulemaking process, that is because "there was no specific definition of lump sum income that * * * Congress [could have] intended to maintain" or change. 51 Fed. Reg. 9197 (1986). The Secretary had previously allowed states to treat various lump sum payments, including personal injury and workers' compensation awards, as either "income" or "resources,"[3] and, accordingly, the practice among the states was varied in 1981 (see *ibid.*). Indeed, this is a principal reason that the President of the Welfare Recipients League gave for opposing enactment of the proration requirement. See *Administration's Proposed Savings in Social Services Programs, Hearings Before the House Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means,* 97th Cong., 1st Sess. 316 (1981) (complaining that the proration proposal would require AFDC families to budget personal injury awards). Accordingly, "[t]here is no reason to suppose that the Congress that enacted [the proration requirement] legislated in ignorance of" this practice (*Heckler* v. *Turner*, slip op. 12), and its "failure to change the

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[2] For the Court's convenience, we have reproduced as an appendix to this brief the portion of the Seventh Circuit's recent opinion in *Watkins* that deals with the question at issue here.

[3] See Handbook of Public Assistance Administration, Part IV, S-3120 (Sept. 1957) ("a settlement of industrial compensation * * * *might* represent a [resource]") (emphasis added); see also *Watkins* v. *Blinzinger*, 789 F.2d at-480-481 & n.7, App., *infra*, 13a-14a & n.7.

scheme under which the [Secretary] operated is * * * 'persuasive evidence that the interpretation is * * * one [that] * * * Congress' " approved. *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 9 (quoting *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)); see also *CFTC* v. *Schor*, No. 85-621 (July 7, 1985), slip op. 11; *Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981); *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457 (1978).

Indeed, it was Congress's enactment in 1981 that provided the catalyst for the Secretary's recent regulatory action. Prior to 1981, the distinction between lump sum "income" and "resources" was relatively insignificant. If not dissipated in the month of receipt, all lump sum "income" became "resources" in the following month (and potentially disqualified a recipient family from receiving AFDC benefits). But the 1981 amendment made the distinction one with important consequences and, therefore, for the first time, provided the Secretary with a substantial need to establish a uniform definition of "income" for orderly administration of the program. Cf. *United States* v. *Morton*, 467 U.S. 822, 835-836, n.21 (1984). Accordingly, in 1982 and 1986, when the Secretary undertook to provide the states with such a definition, he properly placed great emphasis on the intent of Congress in enacting the 1981 amendment. Since the Secretary had proposed that amendment and had made his views concerning its purpose well-known to Congress before it was enacted, his conclusions concerning its meaning and intended effect are entitled to particular deference. See *Aluminum Co.* v. *Central Lincoln Util. Dist.*, 467 U.S. 380, 390 (1984); *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979); *Udall* v. *Tallman*, 380 U.S. at 16.

C. The Court of Appeals' Opinion Provides No Persuasive Reason For Overturning the Secretary's Interpretation

The court of appeals offered three principal reasons for overturning the Secretary's interpretation of the term "income" in this statute. First, the court stated that personal

injury and workers' compensation awards cannot be income because they produce no "gain or profit" for the recipient. Second, the court indicated that the Secretary's inclusion of such awards in AFDC income cannot be reconciled with their exclusion from "income" in the Internal Revenue Code. Finally, the court deemed it arbitrary and capricious for the Secretary to permit the states to treat casualty loss awards differently than personal injury awards. None of these reasons constitutes a proper basis for rejecting the Secretary's interpretation.

1. This Court has already held that "gain or profit" is not a *sine qua non* of "income" under the AFDC program. In *Heckler* v. *Turner, supra*, the Court held that the term "income" refers to the gross receipts a family has available for its support. See slip op. 8-10, 16-26. The Court contrasted the Act's use of the term "income" with its use in other provisions of the term "earned income" (see *id.* at 8-9), the latter concept being closely analogous to the "gain or profit" criterion adopted by the court of appeals here. This Court concluded that "earned income" is a "a subset of the broader term 'income' " (*id.* at 9), and that the broader term "income" refers to the gross receipts a family has available to meet its monthly needs (see *id.* at 8-10, 16-26). Personal injury and workers' compensation awards are generally available (at least in part) for that purpose; accordingly, the Secretary has reasonably required the states to treat those receipts as "income" to the extent they are not committed to other uses. See *Watkins* v. *Blinzinger*, 789 F.2d at 482-483 (App., *infra*, 16a-17a); see also *Walker* v. *Adams*, 741 F.2d 116 (6th Cir. 1984) (receipt of insurance settlement constitutes income).

2. Contrary to the court of appeals' view, the Secretary's interpretation of "income" is supported, rather than undermined, by the treatment of personal injury and workers' compensation awards in the Internal Revenue Code. There, the term "gross income" means "all income

from whatever source derived" (26 U.S.C. 61). Amounts received as personal injury and workers' compensation awards are excluded from this definition only by express provision. See 26 U.S.C. 104(a). No such exclusion exists in the AFDC provisions. That omission reinforces the view that Congress did not intend for a comparable exception to exist in the AFDC program. Moreover, the exclusion of personal injury and workers' compensation awards from the definition of "income" in the Internal Revenue Code simply indicates that Congress did not want to tax the recipients of such payments; it does not answer the question whether Congress wanted further to subsidize those recipients by providing them AFDC benefits as well. See *Watkins* v. *Blinzinger*, 789 F.2d at 477-478 & n.5 (App., *infra*, 6a-7a & n.5); see generally *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981) (meaning of statutory term must be considered in context). As explained above, the Secretary has reasonably concluded that Congress did not intend to do so.[4]

3. Finally, the court's finding that the Secretary has arbitrarily and capriciously allowed the states to treat casualty loss awards differently from personal injury awards is now a moot point. The Secretary's rules now clearly require the states to treat awards for casualty losses and personal injury and workers' compensation losses similarly:

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[4] Similarly, the treatment of personal injury and workers' compensation awards in the Food Stamp Program and various poverty guidelines that the Secretary has issued supports, rather than undermines, the treatment that the Secretary has given them in the AFDC program. In the Food Stamp Program and the poverty guidelines, "income" is an all-inclusive concept from which personal injury and workers' compensation awards are expressly excluded. See 7 U.S.C. 2014(d)(8) (Food Stamp Program); 48 Fed. Reg. 7010, 7010-7011 (1983) (poverty guidelines). The absence of a parallel exclusion in the AFDC provisions again indicates that no such exception was intended. In any event, those programs serve their own distinct purposes, and the meaning of the term "income" is properly determined only in the particular context of each program. See *Heckler* v. *Turner*, slip. op. 8-26; *Watt* v. *Alaska*, 451 U.S. 259, 266 & n.9 (1981).

Both are "income" subject to proration to the extent they are not earmarked and used for a specific purpose. See 51 Fed. Reg. 9205 (1986) (to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F)) (page 2, *supra*) (any amount that is earmarked and used for "back medical bills * * * funeral and burial costs, *replacement or repair of resources*" is to be excluded for purposes of applying the proration rule) (emphasis added). See also *United States* v. *Morton*, 467 U.S. at 835-836, n. 21 (agency can by regulation properly resolve interpretive issues that arise in litigation). In any event, there is far-reaching legislative discretion to adopt such classifications in the context of social welfare programs. See, *e.g.*, *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

In sum, there was no proper basis for the court of appeals' overturning of the Secretary's considered interpretation of the Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1986

APPENDIX

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

Nos. 85-2366, 85-2481.

TOMMIE E. WATKINS, ET AL, PLAINTIFFS-APPLELLANTS,

v.

DONALD BLINZINGER, ET AL, DEFENDANTS-APPELLEES,

DOROTHY DAVIS, ET AL, PLAINTIFFS-APPELLANTS,

v.

GREGORY COLER, ET AL, DEFENDANTS-APPELLEES.

Argued Feb. 21, 1986.

Decided April 18, 1986.

Rehearing and Rehearing En Banc in No. 2366 Denied May 12, 1986.

Before BAUER, WOOD and EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

Recipients of Aid to Families with Dependent Children (AFDC) are dropped from the program if their incomes exceed the "standard of need" in their states. They also are dropped if their "resources" exceed $1,000. A person who receives a lump-sum payment wants to have the payment called a "resource" rather than "income."

If the lump sum is a "resource," the recipient may spend it as he pleases; once cash on hand and other valuable assets dwindle to less than $1,000, the person will be restored to the rolls. If the lump sum is "income,"

however, it must be budgeted. Under 42 U.S.C. § 602(a)(17), the state's welfare officials divide the lump sum by the monthly "standard of need." See also 45 C.F.R. § 233.20(a)(3)(ii). The quotient gives the number of months the person will be ineligible for aid. For example, if a person receives $20,000, and the monthly standard of need is $500, the state will divide $20,000 by $500, producing a quotient of 40. The recipient will be ineligible for AFDC for 40 months. This method treats the lump sum as if the amount of the "standard of need" had been received as monthly income during the months following receipt of the lump sum.[1] A recipient who spends a lump sum classified as "income" and becomes destitute remains ineligible for the program nevertheless, while if the lump sum had been called a "resource" eligibility would have been restored.

We have consolidated two cases presenting the question whether lump sums that compensate victims for personal injuries are "income" or "resources" for purposes of AFDC. *Watkins v. Blinzinger* is a challenge to Indiana's implementation of the AFDC program, *Davis v. Coler* a challenge to Illinois's. Both states have chosen to treat lump sum payments attributable to personal injuries as "income," an option that the Department of Health and Human Services contends states possess.[2] Both cases

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[1] The system gives the recipient the benefit of the interest that may be earned from the lump sum. If $20,000 is invested at 10% and drawn down at a level rate over 40 months, it will produce $590 per month. If a $20,000 fund invested at 10% is tapped for $500 a month, it will last for almost 49 months. The regulations disregard this complication, as do we.

[2] The Department has proposed a regulation that would require states to treat all lump sum payments as "income." See the proposed amendment to 45 C.F.R. § 233.20(a)(3)(iv)(E), published for comment at 49 Fed.Reg. 45561, 45567-68 (1984). It has not yet adopted this regulation, however, and its briefs take the position that until it does, the states may elect to treat lump sum payments as income or resources at their option.

were filed as class actions on behalf of all AFDC recipients who have received or will receive lump-sum payments on account of personal injuries.[3] Both courts sustained the states' positions, concluding that the states and the Secretary of Health and Human Services have discretion to treat such payments as either income or resources. *Watkins v. Blinzinger,* 610 F.Supp. 1443 (S.D.Ind.1985); *Davis v. Coler,* 601 F.Supp. 444 (N.D. Ill.1984). *Watkins* also rejected the plaintiffs' request for a declaratory judgment that until 1983 Indiana had been violating § 602(a)(17) by dividing the lump-sum payment by the portion of the "standard of need" (90%) that the state customarily paid to AFDC households, rather than by the "full" standard of need. The district court concluded that

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[3] Despite Fed.R.Civ.P. 23(c)(1), which requires a decision on the application for certification of the class "[a]s soon as practicable after the commencement of an action brought as a class action", neither district court addressed the motion for certification until it had granted summary judgment to the defendants. Each court then declined to certify the class. The district court in Illinois refused to rule on the motion for certification, and the district court in Indiana denied the motion without stating reasons. Neither is an appropriate procedure. The decision on certification should be made quickly. Both sides have an interest in prompt certification. To the extent the district courts thought certification unnecessary once they had ruled for the defendants, they were mistaken. *Vickers v. Trainor,* 546 F.2d 739, 747 (7th Cir.1976). A deferred ruling converts the class action to an opportunity for one-way intervention, which Rule 23 is designed to avoid. *Roberts v. American Airlines, Inc.,* 526 F.2d 757, 762 (7th Cir.1975), *cert. denied,* 425 U.S. 951, 96 S.Ct. 1726, 48 L.Ed.2d 195 (1976). The defendants have an interest in obtaining the preclusive effect of a certification, which prevents members of the class from bringing the same suit later on. The plaintiffs, who may appeal the denial of relief, also have an interest in knowing whether the stakes on appeal include the interests of the whole class. Nonetheless, the defendants have not asked us to remand for certification of the classes to obtain a broader preclusive effect in the event we affirm, so we shall not discuss the question further.

because Indiana had switched to the use of the "full" standard of need, the claim was moot. We discuss this in Part II below.

I

There has been a good deal of litigation about the treatment of personal injury awards. *Reed v. Health and Human Services,* 774 F.2d 1270 (4th Cir.1985), pet. for cert., 783 F.2d 454 (4th Cir.1986) [*sic*], the only appellate decision on the question, holds that lump sum payments for personal injuries must be treated as "resources." The district courts are divided. *Jackson v. Guissinger,* 589 F.Supp. 1288 (W.D.La. 1984), and *Betson v. Cohen,* 578 F.Supp. 154 (E.D.Pa.1983), rev'd on other grounds sub nom. *Barnes v. Cohen,* 749 F.2d 1009 (3d Cir.1984), *cert. denied,* ____ U.S. ____, 105 S.Ct. 2126, 85 L.Ed.2d 490 (1985), like the two cases we have on appeal, hold that states may treat personal injury awards as income. *LaMadrid v. Hegstrom,* 599 F.Supp. 1450 (D.Ore.1984); *White v. Rahm,* No. C85-007T (W.D.Wa. Apr. 20, 1985); and *Payne v. Toan,* 626 F.Supp. 553 (W.D.Mo.1985), come out the other way. We disagree with these cases and with *Reed.*[4] The language and legislative history of § 602(a)(17) allow the states and the Secretary to define "income," and therefore Illinois and Indiana were entitled to treat compensation for personal injury as "income."

The statute uses the word "income" but does not define that word. We must look elsewhere for help. Start with the obvious. Money paid to compensate people for personal injuries is income in a fundamental sense. It may be spent. It is no different from money received as wages, though as we discuss later it is usually not taxable. Much of the value

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[4] Because this opinion creates a conflict among the circuits, it was circulated to all judges in regular active service. See Circuit Rule 16(e). No judge requested rehearing en banc concerning the definition of "income" under § 602(a)(17).

of an award may represent lost wages, past and future. Whoever computes the award will start with the reduction in earnings, discount this to present value, and award that sum to the injured person. *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194 (7th Cir.1982). That the injured person receives his future wages all at once through the award rather than in weekly installments over the course of a lifetime does not change the character of the money.

An award may have other sources, too—compensation for pain and suffering, for mutilation, for property damage, for emotional injury, for medical expenses. To the extent these reflect loss in future market opportunities, they are the same as a replacement of future earnings. The loss of a limb, for example, may reduce potential earnings, and the award for the loss therefore is a substitute for these earnings. The other bases of personal injury awards are less closely tied to the employment market, and plaintiffs urge us to treat these sources, indeed the whole award, as "compensation" rather than "income"—as an even trade for the loss of one's body or an injury to one's psyche. What makes one whole is not gain, and without gain there can be no income.

This is wrong as a statement of legal life. Suppose a person bought a painting for $50,000 in 1970 and sold it for $100,000 in 1985. During these 15 years the cost of living rose by more than 100%; the increase in the price of the painting did not keep pace with the reduction in the value of money. The painting's owner is poorer with $100,000 in 1985 than he was with a $50,000 painting in 1970. As an economic matter he has suffered a loss. Yet as a legal matter he has received $50,000 in "income," on which he must pay tax at the capital gains rate. The law looks to the receipt of money, not to the existence of economic gain. (We discuss below the extent to which this exchange would yield a "resource" in the AFDC program.)

The point may be plainer if we consider how anyone earns wages. To earn money a person must sell a little bit of himself. He sells time, and with it the right to engage in leisure; sometimes he sells his health (by working in a place with contaminants) or his body (by working in a place with physical risks). In exchange for giving up these things, he receives a wage. Over the course of a lifetime this will wear him down. Time and labor wear us all down. Is the wage "gain," or is it just "compensation" for the time, the labor, the risk of injury, that goes with work? The inquiry is metaphysical, the answer arbitrary. The answer of the tax system is that the wage is "income;" the answer of the tax protester is that the depreciation of the person (a wasting asset) exactly offsets the wage, and so there is no income. The plaintiffs in this case have taken the tax protesters' view of income, as only the excess of receipts over the costs borne to obtain those receipts.

The plaintiffs also say that pain and suffering is different, clearly not a substitute for earnings. Even here, though, things are not so clear. Football players sacrifice their bodies (they "play with pain") to perform their jobs. They trade pain for income. People sell parts of their bodies (blood and kidneys) for money. See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights,* 85 Colum.L.Rev. 931, 945-49 (1985) (collecting sources). What they get in return is "income." *United States v. Garber,* 607 F.2d 92, 102-05 (5th Cir.1979) (en banc) (dissenting opinion; the majority reversed a conviction because of improper instructions on wilfulness without resolving this question). People may participate in experiments in which they receive electrical shocks for incorrect answers, or they may take new drugs. Here, too, they receive income in exchange for the pain or the risk of ill health.

All of this is not to say that compensation for lost wages, or for pain, *must* be deemed "income." "Income" is a legal construct rather than an economic truth; there is no

natural meaning of a legal construct. The tax law has things both ways. It defines almost every receipt of money as income, see 26 U.S.C. § 61, and then establishes special exclusions for damages, see 26 U.S.C. § 104. The definition of income in § 61 includes damages representing income of every kind, see *United States v. Safety Car Heating & Lighting Co.*, 297 U.S. 88, 93-94, 56 S.Ct. 353, 356, 80 L.Ed. 500 (1936), though it does not cover a replacement of "capital." Section 104(a)(2) then allows exclusion of damages received "on account of personal injuries or sickness". Section 104(a)(3) establishes still another rule for sums received through accident or health insurance (which may cover the same losses): these proceeds are excludable to the extent the taxpayer purchased the insurance with taxable income, but the proceeds are taxable income if the insurance is "attributable to contributions by the employer which were not includible in the gross income of the employee".[5] This is not a line based on logic; it is a practical compromise. So, too, is any other working definition of "income." Should "income" be defined as all receipts, and then reduced by deductions and exclusions? The Internal Revenue Code takes this position; it could equally well have provided that all costs and expenses must be subtracted from gross receipts to produce the definition of "income."

The Secretary of Health and Human Services has recognized the arbitrary quality of any definition of "income" by allowing states (so far) to treat personal injury awards as income or not, at their option. This is certainly permitted by the analogy to the Internal Revenue Code, which defines "income" as gross receipts rather than net

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[5] The Fourth Circuit's decision in *Reed* rested in part on a conclusion that damages awards are not "income" under § 104. See 774 F.2d at 1274. This is a misunderstanding of the Code. The awards are income by virtue of § 61 and excluded from taxation, in part, by virtue of § 104.

gain. See also *Heckler v. Turner,* ____ U.S. ____, 105 S.Ct. 1138, 84 L.Ed.2d 138 (1985), which holds that in calculating income under the AFDC program the Secretary may look to gross receipts, rather than to receipts less the expenses the recipient incurs in producing the income. (These costs are handled by a fixed "disregard" rather than deducting the actual costs of producing the income.)

To the extent the definition of income is a matter of logic, there is support for either treatment. When there is support for either treatment, the decision of the Secretary and the states must prevail. *United States v. Riverside Bayview Homes, Inc.,* ____ U.S. ____, 106 S.Ct. 455, 461-62, 465, 88 L.Ed.2d 419 (1985); *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.,* ____ U.S. ____, 105 S.Ct. 1102, 1108, 1112, 84 L.Ed.2d 90 (1985); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984); *American Paper Institute, Inc. v. American Electric Power Service Corp.,* 461 U.S. 402, 423, 103 S.Ct. 1921, 1933, 76 L.Ed.2d 22 (1983) (if the interpretation is "a reasonable interpretation of the relevant provisions" it must be sustained). The Secretary has a general power of superintendence, and his treatment should be accepted unless beyond the pale of reasonableness. The Secretary's treatment is especially useful when, as here, he had a hand in drafting the legislation (on which more below) and offered a contemporaneous construction. See *Miller v. Youakim,* 440 U.S. 125, 144, 99 S.Ct. 957, 968, 59 L.Ed.2d 194 (1979); *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).

All welfare legislation depends on the interaction of the definition of income, the guaranteed level of support, and the rate at which support is withdrawn as income rises. States largely control the standard of need and the degree to which more income leads to a reduction in support. See

Heckler v. Turner, supra, 105 S.Ct. at 1142 & n.3. It is not possible for a court to change one of these variables without affecting all. Because AFDC is a program of cooperative federalism, and because states control most of the important variables, the Secretary's position that the states also may include or exclude certain items from the definition of "income" is entitled to considerable respect. If the Secretary (or a court) forced a state to exclude an item from income, it might respond by reducing the payments to all recipients of AFDC. A court should require such a revamping of the program only if the legislation at hand leaves no alternative.

The question, then, is whether Congress left the Secretary and the states but one option—to treat personal injury awards as "resources." The language of the statute offers no help. The plaintiffs rely on the legislative history, but this turns out to be no more illuminating. Section 602(a)(17) was § 2304 of the Omnibus Budget Reconciliation Act of 1981 (OBRA).[6] OBRA was a Christmas-tree bill amending scores of laws in pursuit of fiscal savings. Until § 602(a)(17) was enacted, a recipient of a lump sum would become eligible for AFDC again as soon as he had spent the money. The Secretary drafted new language, which became § 602(a)(17), and proposed it to Congress as a method to induce recipients of AFDC to conserve nonrecurring receipts—and not incidentally to reduce the cost of the AFDC program. Congress enacted § 602(a)(17) exactly as the Secretary proposed it.

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[6] There have been two amendments since 1981. A change effective July 18, 1984, inserted "earned or unearned" before "income" to make it clear that all sources of income must be budgeted. A further change effective October 1, 1984, established that the statute applies to all people receiving AFDC benefits and not just those who had other earned income. See § 2632 of the Deficit Reduction Act of 1984, Pub.L.98-369. Neither of these changes affects the structure of § 602(a)(17), which for purposes of this case we may take as the product of OBRA alone.

The Senate Committee on Finance approved the proposal with the remark: "[L]ump-sum payments should be considered available to meet the ongoing needs of an AFDC family. The present treatment of such payments has the perverse effect of encouraging the family to spend such income as quickly as possible in order to retain AFDC eligibility. The committee amendment would require that such income received in a month be considered available as income in the month that it is received and also in future months. . . . [A]ny amount of income that exceeds the initial month's needs standard would be divided by the monthly needs standard, and the family would be ineligible for aid for the number of months resulting from that calculation." S.Rep. No. 97-139, 97th Cong., 1st Sess. 505 (1981), U.S. Code Cong. & Admin.News 1981, pp. 396, 771. In another section of the report the Committee used "retroactive social security benefits" (*id.* at 436, U.S. Code Cong. & Admin.News at 702) as the sole example of the sort of lump-sum payments that would be considered "income." A summary by the staff of the pending proposals states the effect of the change this way: "Require that large payments, together with other income remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program. . . ." Committee on Finance, Staff Report, "Proposals for Reduction in Spending Programs," Part I, at 33 (Committee Print 1981). The committee in the House also endorsed the Secretary's proposal but did not discuss the subject separately in its report. A section-by-section analysis of the Secretary's proposal appended to the House report explains that the proposal would "[r]equire States to consider all lump-sum payments as income available to meet a family's needs. . . . Any excess sum in the month when received would be carried forward for later use." Committee on Ways and Means, Staff Report, "Description of the Administration's Legislative Recommendations," at 53 (Committee Print 1981).

The plaintiffs allow that the states' definition of "income" is consistent with the purpose of the legislation. The more receipts are defined as "income," the more recipients of AFDC will be induced to conserve and budget their funds, and the less the AFDC program will pay out. Yet the plaintiffs also observe, accurately, that the legislative history does not define the "income" that is subject to the budgeting rule of § 602(a)(17). The staff summaries in both House and Senate say that the language applies to all "large payments" (Senate staff) or "lump-sum payments" (House staff), which implies that damages awards from personal injuries must be "income." But the words of the staff are not the equivalent of statements in committee reports, and the implication that all lump-sum payments are income may be inadvertence rather than considered conclusion. The subject was simply not under discussion.

The statements of the Secretary are a little more useful, but also not conclusive. For example, the Secretary's message of May 5, 1981, transmitting his proposals to Speaker O'Neill, contains much language about the benefits of inducing the budgeting of "large payments," but the Secretary did not offer a definition of income. The Secretary's summary of the draft bill states in part: "Under current law, there is no way to assure that large payments, such as lump-sum payments of insurance proceeds, or retroactive benefit payments, are considered available to meet current needs over a period of time, even though the family eligibility can be curtailed for the month of receipt. The proposal would specify that these large payments, together with other income remaining after application of the disregards, would be considered as income . . ." Transmittal of Secretary Schweiker to Speaker O'Neill at 10-11. The Secretary's testimony explaining the proposal offers another illustration but still no definition. The testimony states: "When a large amount of money is received as a lump sum – for example, an inheritance – we

will consider it as income available for support not only in the month it is received but to meet future needs." Secretary Schweiker's prepared statement before the Senate Committee on Finance, at 18. Again the Secretary invites us to infer from the examples of insurance proceeds, retroactive payments of benefits, and inheritances, that *all* large lump sums are "income"; again the plaintiffs properly respond that the Secretary never said this, and that each of these three illustrations could be distinguished from awards of damages for personal injuries. Inheritances are "gain" by plaintiffs' lights; retroactive payments of, say, workers' compensation benefits are wage-substitutes; insurance proceeds could be from kinds of insurance other than disability.

The inescapable fact is that Congress wanted to compel recipients of AFDC to budget lump-sum receipts of "income" but did not consider what "income" might be. Perhaps the Secretary and many Members of Congress assumed that all lump sums are "income," but this was not the subject of debate or decision. The most that can be said is that Congress did not prescribe any restriction on the definition. Any definition that includes particular lump sums within the category "income" is consistent with the purpose of § 602(a)(17) to reduce the incentive to spend large receipts quickly. Because the Secretary has the discretion to define income in any way consistent with the will of Congress, this is enough support for his position.

The plaintiffs have two final lines of argument. One is that because Congress did not *change* the definition of "income" in 1981, the Secretary should have stuck with the approach in force in 1981, which would have classified personal injury awards as "resources." The other is that the Secretary must be consistent in defining resources, and that because a regulation defines the receipts from the sale or exchange of a resource as a resource, the Secretary also

must define personal injury awards—the equivalent of receipts from the sale or exchange of the AFDC recipient's person—as resources.

The Fourth Circuit was persuaded in *Reed* that "income" means only net gain, and that because Congress did not change this meaning in 1981 damages awards cannot be income. 774 F.2d at 1275. We have discussed above the reasons why "income" may mean gross receipts as easily as it means net gain. The Supreme Court in *Heckler v. Turner* used gross receipts as the meaning of income for purposes of AFDC, and there is no reason why damages on account of personal injury should receive a different treatment. See also, *e.g., Walker v. Adams,* 741 F.2d 116 (6th Cir.1984) (treating as "income" for purposes of AFDC a payment received as an insurance settlement for the demolition of a car). The plaintiffs reply that the Secretary himself has treated personal injury awards as "resources" since 1957, when a "Handbook of Public Assistance Administration" informed states that they must treat as "income" any lump sum that represents "accumulated current income." This meant, the Handbook said, that Social Security benefits and workers' compensation benefits are "income" even if paid in lump sums. According to the plaintiffs, however, the Handbook told states to treat as "resources" compensatory payments for the loss of a hand or foot. This means plaintiffs conclude, that all recoveries for personal injuries must be "resources."

The Handbook is not as clear as the plaintiffs portray it, however. It says only that payment for the loss of a hand or foot "might" be a resource.[7] The Handbook leaves this

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[7] Here is the full quotation: "The [state] agency should make certain that the kind of resources considered 'lump sum' payments are in fact in the nature of a non-recurring sum or a windfall and *not* a resource that represents accumulated current income received in a single sum. For example, the initial [Social Security] payment representing an accumulation of current monthly benefits would not under Bureau

decison to the state. Perhaps more interesting, it instructs states to treat accumulated workers' compensation payments—an administrative substitute for awards of damages—as "income." So, too, disability payments under the Social Security system, still another means of compensation for personal injuries, are unquestionably "income" for purposes of AFDC. All in all, this Handbook supports the Secretary more than it supports the plaintiffs. The plaintiffs also rely on briefs attempting to summarize the Secretary's policy. These are not useful guides; the Secretary's handbooks and regulations, not the efforts of lawyers to summarize them, create the agency's policy. Cf. *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95, 63 S.Ct. 454, 462, 87 L.Ed.2d 626 (1943).

The plaintiffs' final ground, tracking the Fourth Circuit, is that states must treat like things alike. The Secretary has promulgated an "equitable treatment" regulation, 45 C.F.R. § 233.10(a)(1), to this end. Both Illinois and Indiana treat as a "resource" cash from the sale or exchange of another "resource." So, for example, if a family sells its refrigerator and receives $100, that money is a "resource." So, too, if the family's car is wrecked and the family receives insurance proceeds, those proceeds are a "resource." The Fourth Circuit concluded that the

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policy represent a 'lump sum.' In like fashion, industrial compensation payments representing accumulated weekly or monthly amounts would not be thought of as 'lump sum' payments. On the other hand, a settlement of industrial compensation as the result of loss of hand or foot might represent a 'lump sum' payment." Handbook of Public Assistance Administration, Part IV, S-3120, at 1 (Sept. 7, 1957) (emphasis in original). The passage is hard to understand because of changes in terminology. In 1957 "Lump sum" denoted payments that were not counted as income. It is also important to understand that the addressees of this advice were state and local administrators. In current terminology the Handbook told these administrators that they must count accumulated income-substitutes as income, but that they "might" treat compensation for loss of body parts as a resource.

disparity between the treatment of the replacement of "resources" and the treatment of damages awards—which it saw as just another receipt for the sale or exchange of an asset, one's person—violated the equitable treatment rule of § 233.10(a)(1). 774 F.2d at 1275.

This reasoning is circular, however. The rule treating as a "resource" the proceeds of the sale or exchange of a "resource" treats likes alike. A household that has the $100 rather than the refrigerator is little different from the household with the refrigerator and no cash. The family still has less than $1,000 in assets. Because the exchange does not change the family's command over real resources, it does not occasion a change in eligibility for AFDC—whether or not the family chooses to use the $100 to buy a new refrigerator, or the insurance proceeds to buy a new car. (If the exchange produced a gain, the family must "spend down" to $1,000 again.) The question in this case is *whether* the receipt of damages for personal injury is a mere exchange of one asset for another. A person who has "exchanged" pain and suffering for cash has greater market opportunities at his disposal; he can use the cash to improve his position. We assume that the "equitable treatment" regulation does not require wages to be treated as "resources" on the ground that the worker "exchanges" sweat and time for money. Because most income is produced by exchanging something (time, energy, risk of injury) for money, it is not dispositive that *some* kinds of exchanges (refrigerators for money) are not "income." The tax system regularly distinguishes between receipts from the sale or exchange of property (taxed only to the extent price exceeds basis, and some like-kind exchanges are not taxed) and receipts attributable to other sources, such as labor (people have no "basis" in themselves). We do not think a state violates the "equitable treatment" regulation by drawing the same sort of distinction. We have explained above that the Secretary and the states are entitled

to treat damages on account of personal injuries as more similar to wages or other gross receipts than to exchanges. It follows that the Secretary and the states need not treat damages awards in the same way they treat the sale or exchange of refrigerators.

Although we have concluded that the Secretary and the states are authorized to treat the award of damages for personal injuries as "income," we do not imply that the exercise of this authority is always desirable. The AFDC program has only two categories, "income" and "resources," and two categories are insufficient to exhaust the variousness of experience. Cf. *Stephens v. Heckler*, 766 F.2d 284 (7th Cir.1985). Awards for personal injuries will represent past and future income in part, punitive damages in part, pain and suffering in part, and medical expenses in part. An approach that sweeps all into "income" overstates the amount of cash that an award makes available to the family, just as surely as an approach that sweeps all into "resources" understates the family's income. Cf. *Schweiker v. Gray Panthers*, 453 U.S. 34, 48, 101 S.Ct. 2633, 2642, 69 L.Ed.2d 460 (1981). Suppose a person receives $20,000, half of which represents lost future wages and half of which represents the present value of medicine that the injured person must use for the rest of his life. Only $10,000 of this award is available to meet household expenses; the rest must be invested and spent on medicine many years hence. If the state requires the family to use the whole $20,000 for subsistence, which under § 602(a)(17) is the result of calling the whole $20,000 "income," there will be nothing left to buy the medicine. The reply Illinois gave at oral argument—that the state will furnish the medicine without cost to all recipients of AFDC—assumes that a family stays on welfare forever. This is not so, and a state ought not to increase the likelihood of a family's needing to stay on welfare by appropriating to itself the benefits of awards that are designed to cover medical costs.

So the Secretary's definition of income may produce harsh results. It is not an unlawful definition on that account, however, because the result will be unpleasant no matter what. Even if the $10,000 for medicine were called a "resource," the recipient would be disqualified from the AFDC program until he had spent all but $1,000 of the money. So even if the money designated for medicine were called a "resource," as plaintiffs wish, the state still would not allow the recipient to devote the money to its intended purpose. Too, the statute offers routes to ameliorate the harshness of calling everything "income." The AFDC program has a separate limit on the kind of "income" that a recipient must apply toward subsistence. The state must exclude from income a series of "disregards" (discussed in *Heckler v. Turner, supra*) that are proxies for the costs of generating the income. Perhaps an appropriate "disregard" could or must be matched against the portion of an award representing medical expenses. We do not consider this question here, as the parties have not raised it. Moreover, § 2632 of the Deficit Reduction Act of 1984 allows states to shorten the period of ineligibility created by § 602(a)(17) in order to take account of the fact that lump sum payments may cover fixed expenses and so not be available to meet the costs of living. See also the interim implementing regulations, 45 C.F.R. § 233.20(a)(3)(ii)(F), 49 Fed.Reg. 35586, 35591-92 (Sept. 10, 1984). Indiana has exercised its option under § 2632 and excludes from "income" the portion of an award of damages attributable to medical expenses. In the hypothetical we have given, Indiana would treat only $10,000 of the $20,000 award as income.[8] Illinois represented at oral argument that it has

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[8] The operation of Indiana's policy is illustrated by the case of Gaynel Diamond, one of the representative plaintiffs. She received a payment of $3,302.20 on account of an accident. Of this $1,802.20 was for medical expenses and $1,500 was for pain, suffering, disfigurement, and permanent impairment. The state applied the

not exercised this option. This may be heartless, but it is not unlawful. To the contrary, the fact that § 2632 gives states an *option* establishes that they may treat as "income" receipts that they could as readily exclude, and that they may disqualify families from the program for lengthy periods when shorter periods would be as satisfactory from Congress' perspective. Whether to treat medical expenses as "income" is a question Congress has committed to the Secretary and the states.

II

[This portion of the opinion deals with an Eleventh Amendment issue.]

* * * * *

AFFIRMED.

$1,802,20 toward medical expenses, which had been paid by Medicaid. It treated only the $1,500 as available for living expenses. This application of the method of § 602(a)(17) produced a disqualification from the AFDC program for five months. (Illinois, too, excludes past medical expenses; the principal difference is that Indiana also would exclude future medical expenses.)

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No. 85-1858

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, AND ALL OTHERS SIMILARLY SITUATED,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTION PRESENTED

Whether Virginia's Aid To Families With Dependent Children Program (AFDC) violates the Social Security Act and the federal equitable treatment regulation by treating personal injury awards as "income" instead of "resources".

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STATEMENT OF THE CASE

Title IV-A of the Social Security Act, 42 U.S.C. §§ 601 *et seq.*, establishes the Aid to Families with Dependent Children Program (AFDC). Under this program, the federal government provides matching funds to the states for the purpose of providing a monthly income to needy children while the children are deprived of parental support. In determining a family's eligibility for AFDC benefits during the period of deprivation, a state must consider the family's income and resources. 42 U.S.C. § 602(a)(7).

In recognition of the difference between "income" and "resources," the federal statute and regulations have provided for some protections to be applied to "resources" that are inapplicable to "income". Under the Act, all actually available "income" must be counted against the monthly AFDC grant unless excluded by a statutory exception. 42 U.S.C. § 602(a)(7)(A). However, an assistance unit may own certain exempt "resources" such as a home and a car (up to $1500 in value) and retain up to $1000 equity value in non-exempt "resources," including cash, without becoming ineligible for benefits. 42 U.S.C. § 602(a)(7)(B).

Until 1981, there were no exceptions (statutory, regulatory, or otherwise) to the general rule that only "actually available" income and resources could be counted for AFDC purposes. Thus, prior to 1981, if any AFDC recipient received a nonrecurring lump sum of money, the family could reestablish AFDC eligibility upon a showing that the lump sum was no longer actually available or that resources were below resource limitations.

In the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 358 (1981), Congress adopted the "lump sum income rule" found in 42 U.S.C. § 602(a)(17) (Pet. App. 63). Under this amendment, recip-

ients of AFDC who receive "an amount of income which together with all other income. . . exceeds the state's standard of need" are ineligible for AFDC for the period of months determined by dividing the lump sum (and other countable income) by the state's standard of need. By its clear terms, the statute applies only to receipts of "income" and not to resources. Likewise, the implementing federal regulations adopted by the U.S. Department of Health and Human Services (HHS) applied only to receipts of "income." 45 C.F.R. § 233.20(a)(3)(ii)(D) (Pet. App. 68) [1984 version at 45 C.F.R. § 233.20(a)(3)(ii)(F) (Pet. App. 69)].

Both the federal government (until its brief was filed in this Court on June 7, 1986) and the Commonwealth of Virginia (throughout this litigation) explicitly acknowledge that not all lump sums of money fall under the lump sum income rule. Specifically, the rule has no application when money represents a *resource*. Thus, in Virginia's AFDC program, money received upon sale or loss of a car or home or from insurance owned by the family is treated as a *resource*, and the lump sum income rule does not apply. ADC Manual §§ 303.3, 305.4C (J.A. 25-27; Pet. App. 78)[1]

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[1] In 1982 Virginia's regulation provided that money received from exempted resources are resources, not lump sum income, and contained the following example:

> Example 2: Ms. H loses her exempted home as a result of a fire. She receives an insurance settlement in the amount of $20,000. This money is a resource and will be considered in relation to the allowable reserve.

(ADC Manual §§ 305.4C, 303.3) (J.A. 25-26). In January, 1983, the provision was expanded so that proceeds from the sale or conversion of *any* real or personal property are considered *resources:* "[T]he proceeds derived from the sale or conversion of real or personal property are not considered a lump sum. For example, when an insurance policy owned by the assistance unit is cashed in or pays off, the money received will not be considered a lump sum." (J.A. 27)

Even though it treats money received from the sale or loss of property as a "resource," the Virginia Department of Social Services treats money received for personal injuries as "income" and prospectively disqualifies from the program all families who receive personal injury compensation.

Each of the named plaintiffs in this case received money for a personal injury suffered by a family member. They were disqualified from the AFDC program for periods ranging from two to twenty months. Although the briefs of Virginia and HHS omit any mention of the plaintiffs and their fact situations, a review of these facts illustrates the operation and impact of § 602(a)(17) in Virginia.

Ona Mae Reed and her two minor children, age 15 and 10, received AFDC benefits of $233.00 per month in June, 1982. They had no other income. Around June 16, 1982, Mrs. Reed received a worker's compensation lump-sum settlement in the amount of $5,400.00, for injuries she suffered when she fell from a ladder on her job in July 1980. This accident resulted in blood clotting in her legs for which she was hospitalized in 1980 and again in 1982.

The money was used for basic living expenses of shelter, food, and clothing for herself and her children. In addition, Mrs. Reed purchased a used car and used household appliances. Part of the money was spent on the repayment of outstanding loans and bills, including legal fees. By sometime in August, 1982, the proceeds of the settlement were completely exhausted. However, under Virginia's lump sum income policies, Mrs. Reed and her two minor children were found ineligible for AFDC for a period of 20 months (J.A. 13-15).

Sally Long, her disabled husband, and three minor children, ages 16, 14, and 9, were AFDC recipients in April, 1982. They had no other income. Mr. Long was

seriously injured when he was hit by a car. He received a personal injury award of $10,245.95. Most of these funds were used for basic living expenses, including the down-payment on a modest home and a used car. By October, 1982, the money was exhausted, and Mr. Long left the household, leaving Mrs. Long and her three children without any income whatsoever for many months. Mrs. Long reapplied for AFDC in November, 1982, but she was turned down because of the lump sum income rule. Under Virginia's policies, her husband's receipt of $10,245.95 in April, 1982, rendered Mrs. Long and her children totally ineligible for AFDC for eighteen months.

Until the lower court granted her injunctive relief, Mrs. Long and her children lived without utility services, such as electricity, gas, and water. She had been unable to purchase necessary medications or meet her mortgage payments. Her children did not have needed school supplies, clothing or shoes. She depended totally on food stamps and charity to survive (J.A. 15-17).

Ruth Wilcher and her two minor children, age 16 and 9, received AFDC benefits of $255.00 per month in October, 1982. She and her family had no other income. Her sixteen year old daughter was seriously injured in an automobile accident. A personal injury claim, brought on her behalf, was settled for $10,000.00 after payment of attorney's fees. The settlement was approved by the court, and $9,300.00 was deposited by the clerk of court in a trust account, subject to court control, for the benefit of the child. $700.00 was turned over to Mrs. Wilcher to be spent on her daughter's immediate needs.

Mrs. Wilcher bought her daughter some clothing and used the rest of the $700.00 to replace her daughter's bedroom furniture, which had been damaged by two fires.

Under Virginia's policies, the $700 payment rendered her family ineligible for any AFDC benefits for two months and eligible for only partial benefits in the third month (J.A. 18-19).

Opal Mae Cook and her eight year old son received AFDC benefits of $181.00 per month in September, 1983. They had no other income. Her son was injured in a car accident and received $750, after payment of attorney fees, as compensation for his injuries. The money was spent on clothing, coal, and insulation for home heating. Mrs. Cook also spent $200 for a used pickup truck and paid for car insurance.

Because of the lump sum income policies, she was ineligible for any AFDC benefits for three months and eligible for only partial benefits in the fourth month. When she learned of her termination from AFDC, Mrs. Cook sold her truck and cancelled the car insurance for a small refund. However, those funds were soon spent on her living expenses.

Stella King, her disabled husband, and her minor son received AFDC benefits of $233.00 per month. They had no other income. In June, 1983, Mr. King received $2,000 in settlement of a personal injury claim. He took this money and deserted his family two weeks later. Although totally destitute, Mrs. King and her son were disqualified from the AFDC program for seven months under Virginia's lump sum income policies.

In each of the above situations, if the money paid to the family had represented proceeds from the sale or loss of real or personal property, Virginia would not have applied the lump sum income rule to evaluate AFDC eligibility. The family could have requalified for AFDC when the remaining funds fell below resource limits.

Respondents Reed, Long, and Wilcher instituted this action on June 6, 1983, because of the denial, reduction, or termination of their AFDC benefits under the lump sum income rule. They sought injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 and 5 U.S.C. § 701 *et. seq*. They challenged Virginia's policy of counting personal injury compensation as income subject to the lump sum income rule rather than as a resource, asserting the policy to be a violation of the Social Security Act, 42 U.S.C. §§ 602(a)(7), (a)(10), and (a)(17). Later, Respondents Cook and King were allowed to intervene as plaintiffs, and the United States Department of Health and Human Services (HHS) was joined as a necessary party.

On cross-motions for summary judgment, the district court held that Congress did not intend personal injury awards to be treated as income subject to the lump sum disqualification rule. Because all parties agreed that the term "income" is nowhere defined in the AFDC statute or regulations, the district court interpreted the word according to its ordinary and common meaning. In seeking a common usage and definition of the word "income," the district court appropriately viewed dictionary definitions as well as the definitions utilized by other agencies and courts.

Contrary to Petitioner's assertions, the district court did not *rely* on the definition of income in the federal income tax code to support its conclusion that personal injury awards are not income for AFDC purposes. The district court's review of United States Supreme Court opinions dealing with the tax code was "by way of analogy." *Reed* v. *Lukhard*, 591 F. Supp. 1247, 1256 (W.D. Va. 1984) (Pet. App. 48). The district court found it "instructive" that the Supreme Court, when seeking the intent of the creators of the "income" tax system in the Sixteenth

Amendment to the Constitution, held that the common meaning of "income" required realization of gain. *Id.* The district court concluded that Congress intended to limit the application of the lump sum income rule to only those lump sum payments that meet the ordinary meaning of income. *Id.* at 1257 (Pet. App. 50)

The district court also found fault with Virginia's regulatory scheme because people who receive compensation for property damage are not disqualified from the program for a fixed period of time, but people who receive compensation for a personal injury are. The district court utilized a limited "reasonable basis" standard of review to analyze Virginia's regulations. *Id.* at 1255 (Pet. App. 44).

In this context the district court described the anomalous results that the regulations commanded:

Example 1: Ms. H and her two children live in Roanoke and receive $255 AFDC each month. If Ms. H's home burns down and she receives a $20,000 insurance award, she may spend the insurance proceeds on anything she wants and as quickly as she wishes. She can reestablish her AFDC eligibility as soon as her countable resources fall below $600.00. However, if Ms. H's body is burned in a fire, and she receives $20,000 to compensate her loss, the money is treated as lump sum *income*. Ms. H and her children are disqualified from the AFDC program for almost 6 years [20,000 divided by 283 (the standard of need) = 70.67 months], even if the money is expended before that period ends.

Example 2: Ms. H's youngest child, Johnny, is a hit by a car and injured. Ms. H's insurance pays the child $1,000 for his injuries. The family can qualify for AFDC when their available

> resources fall below $600. On the other hand, if the driver's insurance company pays Johnny for his injuries, the money is treated as lump sum *income* and the family is disqualified from AFDC for 3 months and their benefits in the 4th month are reduced to $104.00 (1000 divided by 283 = 3.5 months. $151 of the lump sum remains in the 4th month and is subtracted from the $255 payment.)

Id. at 1254 (Pet. App. 42-43).

The court found that it is "irrational to treat a damaged car or home more favorably than a damaged body" and concluded that the federal and state interpretation of the lump sum income rule as inclusive of personal injury awards is unreasonable and cannot stand. *Id.* at 1257 (Pet. App. 51)

On appeal by Petitioner and the Secretary of HHS, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court in all respects. *Reed* v. *Lukhard*, 774 F.2d 1270, 1272 (4th Cir. 1985) (Pet. App. 5). With regard to the question of whether personal injury recoveries were income for purposes of applying the lump sum income rule, the Fourth Circuit found that, in adopting 42 U.S.C. § 602(a)(17), Congress intended to reach only payments that would ordinarily be considered income and not all large payments of money. 774 F.2d at 1273-75 (Pet. App. 14-17).

The court of appeals also held that Virginia's regulation, which applies the lump sum income rule to personal injury awards but not to property settlements, was arbitrary and inequitable and thus violated the AFDC equitable treatment regulation, 45 C.F.R. § 233.10(a)(1). 774 F.2d at 1275 (Pet. App. 16). The court of appeals said, "The AFDC program was designed to assist the needy; the

state by imposing inequitable eligibility requirements thwarts that purpose and runs afoul of regulations aimed at ensuring fair and unarbitrary treatment." *Id.*

The Petitioner, but not the Secretary of HHS, filed a Petition for Rehearing *en banc* with the Fourth Circuit, which was denied. The federal government also did not join in Petitioner's postjudgment motion to stay the mandate pending Virginia's application to this Court for a writ of *certiorari*. That motion was granted by the Fourth Circuit on November 21, 1985. The Secretary of HHS did not petition this Court for a writ of *certiorari* and expressly waived his right to file a response to the petition filed by Virginia DSS, by a waiver filed February 19, 1986.

On March 18, 1986, only one month after its waiver, HHS issued a new final regulation that requires all states to treat "windfalls" as lump sum income. Unlike the proposed regulations, which had been published sixteen months earlier and had not discussed personal injury awards, the final regulation specifically defines "income" as including personal injury awards. *Compare* 49 Fed. Reg. 45561, 45567-68 (Nov. 16, 1984) *with* 51 Fed. Reg. 9191, 9196-97 (March 18, 1986) (to be codified at 45 C.F.R. § 233.20(a)(3)(ii)(F) (J.A. 82-86).[2]

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[2] It is plainly self-serving for the Secretary of HHS (who has been involved in extensive litigation concerning the definition of "income" for the lump sum rule) to determine in 1986, in the midst of the litigation, that requiring the treatment of personal injury awards as lump sum income is what Congress intended in 1981. Since the federal regulation was not published in final form until five months after the Fourth Circuit's decision, it was not considered below. HHS claims the new regulations is entitled to deference (HHS Brief 16) and that it moots respondents' equitable treatment claim (HHS Brief 18-19). Respondents' position is that no deference is owed to the *post hoc* regulation because it is contrary to the statute, legislative intent,

At this Court's direction, HHS later filed a response to Virginia's petition, which supported the granting of a writ of *certiorari*. This Court granted Virginia a writ of *certiorari* on June 23, 1986.

In HHS's brief on the merits, the Secretary introduces a new issue into this case by "interpreting" his March, 1986, regulation as requiring all states to treat property loss payments as lump sum income (HHS Brief, 9-10, 18-19). This interpretation was neither discussed nor contained in the proposed or in the final regulations and was neither mentioned nor adopted in Virginia's brief on the merits.

SUMMARY OF ARGUMENT

The lump sum income rule, adopted by Congress in 1981, explicitly applies only to receipts of "income," not to "resources." Nothing in the statute or the legislative history suggests any congressional intent to modify the long-standing meaning of "income" and "resources" in the AFDC program.

When the lump sum income rule was adopted, neither the statute nor regulations defined the word "income." It is therefore appropriate and necessary to look at that word's common meaning to derive Congress' intent in adopting the rule. In common usage, as well as in numer-

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prior positions of the agency and because it was promulgated in violation of the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 553 *et seq.* (APA). *See* Argument Section ID, *infra*. If this Court accords any significance to this new regulation, it would be appropriate to remand this case so that the validity of its substance and promulgation can be fully considered. To validate the regulation here in the first instance would be extraordinary. *See EPA* v. *Brown*, 431 U.S. 99, 104 (1977).

ous examples in other contexts, personal injury awards, which compensate an individual for damage to one's body, are not "income," because no gain occurs. This principle is also embodied in the common law, which requires that personal injury awards do no more than compensate the victim for the injury actually sustained.

The legislative history of § 602(a)(17) is consistent with an understanding of the term "income" that excludes personal injury awards. The final committee reports specify that the new rule is to apply only to "payments which meet the definition of income." The reports use as the single example of lump sum income "retroactive social security benefits"—precisely the kind of payment historically defined by HHS as "lump sum income."

The Secretary's pre-OBRA definition of income included lump sums representing accumulated gain (such as retroactive social security payments) but did not include compensatory awards. By using the term "income" in § 602(a)(17), it must be presumed that Congress intended this definition to be followed when it adopted the lump sum income rule in 1981.

HHS has offered conflicting interpretations of the scope of the lump sum income rule since its enactment in 1981. These shifting interpretations culminate in the new regulation just issued in March, 1986, and, even further, in the Secretary's interpretation of the new regulation contained in the brief filed by HHS in this case. The Secretary's current position is not entitled to any deference because it conflicts with the statutory language and its legislative history, as well as longstanding AFDC policy.

The recent regulation defining personal injury awards as "income" subject to the lump sum penalty is also not entitled to deference because it was promulgated in viola-

tion of the Administrative Procedure Act. There was no notice in the proposed regulation that the agency was considering this definitional change. The proposed regulation only addressed "windfalls" and the words "personal injury" were never mentioned.

The Secretary (until filing his brief here) and Virginia have acknowledged throughout this litigation that the lump sum income rule does not apply to every large payment of money. Indeed, Virginia's state regulations incorporate numerous examples of the kinds of payments that fall outside the scope of the lump sum income rule, such as payments for property damage and payments from insurance policies owned by families.

There is no justification for Virginia's punitive treatment of a personal injury award as income while money received for property damage is treated as a resource. Virginia's regulatory scheme creates an irrational system that contravenes the Social Security Act and its regulatory requirements that prohibit arbitrary and inequitable eligibility conditions, 45 C.F.R. § 233.10(a)(1).

The decisions below correctly construed Congressional intent to incorporate in § 602(a)(17) the settled meaning of the term "income," which excludes personal injury awards. They are consistent with more that twenty-five years of federal AFDC policy related to income and resources. These decisions support the equitable treatment of recipients. The judgment of the Fourth Circuit opinion should be affirmed.

ARGUMENT

I. VIRGINIA'S TREATMENT OF PERSONAL INJURY AWARDS AS "INCOME" VIOLATES THE SOCIAL SECURITY ACT

Introduction

This Court has recently analyzed another AFDC amendment adopted in the OBRA legislation. *Heckler* v.

Turner, 105 S.Ct. 1138 (1985). In resolving the question of statutory construction presented in *Turner*, this Court looked to three sources of authority: (1) the "common sense meaning" of the statutory terms used; (2) the legislative history of the provision; and (3) "the Secretary's longstanding definition of the term. . . [that] . . . [t]he OBRA Congress must have had . . . in mind when it reemployed the term in [the amendment at issue]." *Id.* at 1144. Application of the same analysis here results in the conclusion that Congress did not intend the lump sum income rule to apply to personal injury awards.

A. *Plain And Ordinary Meaning Of "Income"*

The statute expressly applies the extended disqualification provision of the lump sum rule to "income" and not to "resources." (Pet. App. 63). "Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction." *Ford Motor Credit Co.* v. *Cenance*, 452 U.S. 155, 158 n.3 (1981). Here Congress chose to effectuate its purposes in enacting the lump sum rule by using the term "income."

Because Congress has never established a working definition for "income" particular to the public assistance statute, the word "income" must be interpreted according to its ordinary, contemporary, common sense meaning. *Turner*, 105 S.Ct. at 1144; *NLRB* v. *Amax Coal Co.*, 453 U.S. 322 (1981); *Accord*, *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). "[L]egislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962).

The meaning of income in ordinary and common dictionary definitions, in numerous administrative contexts, and in our common law has never included the type of payments received by respondents.

Dictionaries are the most authoritative source for understanding the "ordinary meaning" of words, and the definitions they offer simply do not permit a construction of the term "income" that could include a compensatory personal injury award. Leading dictionaries define income as involving a "gain," a concept that excludes the receipt of money as compensation for injuries suffered. *See, e.g., Webster's Third International Dictionary of the English Lauguage* (1976) ("a gain or recurrent benefit that is usually measured in money for a given period of time"); *Black's Law Dictionary* (rev. 5th ed.1979) ("the gain derived from capital, from labor or effort, or both combined, . . . the true increase in amount of wealth which comes to a person during a stated period of time"). *See also*, 42 *C.J.S.* Income § 531 ("In common speech 'income' generally is understood as gain or profit"). None of these definitions apply to the receipt of a personal injury award that compensates the individual for damages suffered.

It is also instructive to look to other statutes in which Congress has characterized personal injury awards to determine if such payments are "income" or "resources." *C.f. Overstreet* v. *North Shore Corp.*, 318 U.S. 125 (1943) (comparing different statutes that each use the term "engaged in commerce" to define the term's meaning). The Internal Revenue Service excludes from income those amounts or sums of money received in personal injury settlements, thus recognizing that compensation for personal injury does not represent any gain to the injured party. The Internal Revenue Code, 26 U.S.C. § 104, clearly states that gross income does *not* include "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." This provision is based upon the pronouncements of this Court for over seventy years.

The specific exclusion of injury awards in § 104(a)(2) of the Internal Revenue Code can be traced to Congress' concern in 1918 that personal injury damages were not income within the meaning of the Sixteenth Amendment. The House Report that explains the intent of the amendment provides:

> Under present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for injury or sickness, and damages received on account of such injuries or sickness are required to be included in gross income. The proposed bill provides that *such amounts shall not be included in gross income.*

(emphasis added) H.R. Rep. No. 767, 65th Cong., 2d Sess. 9-10 (1918). This indicates that the statutory exemption created in 1918 was based upon the belief that injury awards were not income in the first place.

In 1919 the Court reiterated what it believed was "income":

> Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. . .

Eisner v. *Macomber*, 252 U.S. 189, 207 (1919), *quoting Stratton's Independence* v. *Howbert*, 231 U.S. 399, 415 (1913) *and Doyle* v. *Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918). This Court later reiterated that "[D]amages for personal injury are by definition compensatory only." *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 432 n.8 (1955).

Federal administrative constructions of the term "income" for purposes of various federal social welfare programs are similar. For example, HHS does not con-

sider personal injury awards in evaluating income against the official federal poverty lines. In its Annual Revision of Poverty Income Guidelines HHS states:

> For eligibility purposes, income does not refer to the following money receipts . . . one time insurance payments, or compensation for injury.

48 Fed. Reg. 7010, 7011 (Feb. 17, 1983).

Similarly, the food stamp program, administered by the Department of Agriculture, Food and Nutrition Services, specifically designates "lump sum payments" as a "resource" and not "income." 7 U.S.C. § 2014(d)(8); 7 C.F.R. § 273.9(c)(8). This treatment of personal injury awards in the food stamp program, another major needs based program, provides a useful example of the common useage and meaning of the terms "income" and "resources."

A measurable gain to the individual is the common thread among these dictionary, judicial, congressional, and federal administrative definitions. If amounts received by an individual are to be considered income, then the recipient's financial worth must have increased. Conversely, if there is no gain to the individual, or if the amounts received serve merely to replace a loss which has been sustained, then those amounts are not income as defined above.

The personal injury awards received by respondents are properly and logically defined as a resource. A common definition of "resource" is "a source of supply or support; a natural source of wealth or revenue." *Webster's New Collegiate Dictionary* (1981). One's healthy body is certainly an excellent example of a resource. And compensation for loss of or damage to one's body, car, or home,

all squarely fall under the resources category—not the income category.

In addition to dictionary and administrative definitions of income, our common law and history of jurisprudence have long recognized that compensation for personal injury does not represent any gain to the injured party. Instead, such payments represent an attempt to return that party to the *status quo ante*, and "should in all cases be commensurate with the loss or injury sustained." 22 *Am. Jur. 2d* Damages § 85 n.3. As a matter of history and policy it is basic in the common law that personal injury awards do no more than compensate the victim for the injury actually sustained. *Milwaukee & St. P.R. Co.* v. *Arms*, 91 U.S. 489, 495 (1875); *McDermott* v. *Severe*, 202 U.S. 600, 611 (1906) [compensation for mental anxiety is limited to the direct consequences of the physical injury]. The victim receives no profit or gain.

A judgment in a personal injury action must be considered a substitution for wholeness of body. As this Court has long recognized, the personal injury settlement or judgment is calculated to reimburse the injured party for actual medical expenses and fees, and also to pay compensation for the intangible—yet very real—pain, suffering, and metal anguish experienced by the individual. *Chesapeake & O. Ry. Co.* v. *Carnahan*, 241 U.S. 241, 244 (1916) [for future results of injury]; *Southwestern Brewery & Ice Co.* v. *Schmidt*, 226 U.S. 162, 169 (1912) [future pain and disfigurement]; *Kennon* v. *Gilmer*, 131 U.S. 22, 26 (1889) [mental suffering]; *The City of Panama*, 101 U.S. 453, 464 (1879) [permanent injury]; *The Washington*, 76 U.S. 513, 515 (1869) [permanent disability and intense pain].

Virginia law follows this common law and clearly recognizes these aspects of a compensatory award. *See, e.g.*,

Lilley v. *Simmons*, 108 S.E.2d 245, 200 Va. 791 (1959); *McGowan* v. *Taxman*, 132 S.E. 316, 144 Va. 358 (1926). The Virginia Model Jury Instructions provide that "full and fair compensation" for damages sustained include payment for the following items: bodily injuries, effect upon health, physical pain, mental anguish, future pain and mental anguish, disfigurement or deformity and any associated humiliation or embarrassment, inconvenience and discomfort (past and future), medical bills, future medical bills, and loss of earnings or loss of earning capacity. Doubles, Emroch & Merhige, *Virginia Jury Instructions* § 23.01 at 148-49 (1974). Numerous cases discuss these items. *See, e.g.*, *Bell* v. *Kirby*, 226 Va. 641, 311 S.E. 2d 799 (1984). *Todt* v. *Shaw*, 223 Va. 123, 286 S.E. 2d 211 (1982), *Beasley* v. *Bosschermuller*, 206 Va. 360, 143 S.E. 2d 881 (1965); In fact, Virginia law allows a jury to infer pain and mental anguish from bodily injury. *Bruce* v. *Madden*, 208 Va. 636, 160 S.E. 2d 137 (1968).

Thus, the entire amount of the awards received by respondents compensate them for the *full* extent of their injuries—not just for out of pocket losses. Virginia's suggestion that the amount left over after expenses are paid is not compensatory is simply wrong.

Virginia and HHS reject the principle that one's body is an asset, subject to conversion into cash. But as one commentator has stated:

> The prime purpose of damages in tort actions is to compensate a person for injury caused by another's wrongful conduct and, to the extent possible, restore the injured party to the position that would have been occupied had the wrong not occurred—to make the injured party whole again. The basic principle of damages is compensation for actual loss, and the injured party is usually entitled to only an amount which will reimburse him. Obviously in matters such

> as pain and suffering, disfigurement and loss of bodily function the determination of the amount of damages requires a primarily subjective evaluation. It is the trial attorney's task to translate these damages into monetary equivalents.

Minzer, *Damages in Tort Actions* § 1.02. *See also Hahn* v. *Atlantic Richfield Co.*, 625 F.2d 1095, 1104 (3d Cir. 1980) ("If injury occurs, tort law attempts to place the injured party in the *same* position he occupied before the injury.") (emphasis added), *cert. denied*, 450 U.S. 981 (1981).

These principles set forth our judicial system's recognition that there is no way actually to replace or repair the damage to the injured party except through the payment of dollars and cents. Relying on these principles, the Court of Appeals for the Third Circuit concluded that personal injury awards are not "windfalls" that disqualify recipients under Pennsylvania's AFDC lump sum rule. *Barnes* v. *Cohen*, 749 F.2d 1009, 1017-18 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985).

Virginia and HHS ask this Court to read the statute in a manner that not only rejects the common sense meaning of "income" but also in a manner that contravenes fundamental precepts of the common law. This conflicts with another principle of statutory construction that requires all statutes to be read "in the light of the common law." *United States* v. *Sanges*, 144 U.S. 310, 311 (1892). Absent specific evidence to the contrary, this Court reads statutes in harmony with the common law of the states. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976) [§ 1983 is to be read in harmony with general principles of tort immunity and defenses rather than in derogation of them.] In doing so, the Court has assumed that members of Congress are familiar with common-law principles, and that Congress intended these common law principles to apply,

absent specific provisions to the contrary. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

It must be assumed, therefore, absent evidence to the contrary, that Congress did not mean by its use of the common term "income" to contravene the above common law principles. Nothing exists that indicates Congressional intent to abrogate the traditional rule that personal injury awards are not income. Neither the statute nor its legislative history mention personal injury awards, and, in fact, the legislative history shows that the rule is to apply only to payments which "meet the definition of income."[3]

Respondents have received monetary compensation for losses sustained when they were injured. The fundamental requisite for income—the element of a gain or profit—is lacking. Under a common-sense reading of the statute that is consistent with common law, respondents cannot be said to have received "income." The lump sum income rule does not apply to them.[4]

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[3] See, discussion of legislative history, *infra*, Section IB.

[4] In *Watkins* v. *Blinzinger*, 789 F.2d 474 (7th Cir. 1986), *petition for cert. filed*, (August 1986), the Seventh Circuit ignored the common meaning of the term "income" and the purpose of compensatory awards in our judicial system. Using a strained economic analysis, the court determined that a personal injury award is properly "income" because "it may be spent." *Id.* at 476. The "spendability" of an award, however, does not determine its character. While all money "can be spent," not all lump sums are treated as income in the AFDC program.

The Seventh Circuit justified its departure from established definitions by making analogies between personal injury award recipients and wage earners, football players, blood and kidney donors, and experimental and drug testing volunteers. *Id.* at 477. The court's analogies, however, are misleading and inappropriate because the

B. *Legislative History*

The scant legislative history of the lump sum rule is consistent with an understanding of the term "income" that excludes personal injury awards. The Senate Finance Committee Report describes the rule as follows:

> Under present law, *any payments that meet the definition of income* (e.g., retroactive social security benefits) are counted as income in the month of receipt and any of the payment that is not spent in that month is usually considered a resource in the month thereafter. The committee amendment would require that large payments, together with *other income* remaining after the application of disregards, be considered available to meet ongoing needs in the AFDC program. If such income exceeds the standard of need, the household would be ineligible for aid.

(emphasis added) S. Rep. No. 97-139, 97th Cong., 1st Sess. 436, *reprinted in* 1981 U.S. Code Cong. & Ad. News 693, 702 (J.A. 24). The report of the House Ways and Means Committee is to the same effect (J.A. 75).

These reports reveal Congress' intent to reach only those payments in the OBRA lump sum rule that would ordinarily be considered income, not all large payments of money. In the statement of the current law which is to be

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individuals in the examples all voluntarily earned money. Wages are traditionally and commonly defined as "income." Compensation for personal injuries, on the other hand, are neither voluntary nor earned.

Compensation for a personal injury award also differs because it is not bargained for in advance. When a professional athlete plays football with pain, he has contracted for a salary in advance and has decided that his prospects for gain greatly exceed his potential for loss. By contrast, respondents were injured unexpectedly in accidents. The two situations are entirely different.

changed, the explicit reference to "payments that meet the definition of income" demonstrates that Congress was well aware that some lump sum payments did not constitute "income" in the AFDC program, and that only payments defined as income would be affected by the new OBRA rule.

Likewise, in the description of the amendment, the language that links "large payments" together with "*other income*" reinforces the conclusion that only large payments of "income" are covered by the new rule. The reading of these reports urged by Virginia and HHS, that Congress meant to define *all* lump sums as "income," renders these express references superfluous.

That personal injury awards would not be covered by the new rule is made plain by the single example used in the final conference report of the kind of payment to be covered by the new rule—"retroactive social security benefits." This is precisely the type of payment that historically has been viewed by HHS and its predecessors as falling into the "income" category.[5] Thus, Congress expressly limited the scope of the rule to payments representing accumulated gain, and chose the word "income" in the statute to effect its purpose.

Virginia and the Secretary ask this Court to ignore the plain statutory language and the pertinent committee reports. They focus instead on descriptions by Secretary Schweiker (then Secretary of HHS) of the draft bill amending the Social Security Act in 1981. However, the Secretary's expressed intentions at the time OBRA was passed do not support his current contention that the

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[5] See, discussion of the pre-OBRA agency definition of "income," Argument Section IC, *infra*.

lump sum rule was intended to apply to personal injury awards. Indeed, the Secretary is unable to identify one clear expression of such an intent. Virginia and the Secretary make much of the solitary reference in his summary of the draft bill to the term "insurance proceeds," suggesting that it was an expression of agency intent to apply the lump sum rule to personal injury awards. But the paragraph in which this reference is contained appears under the title "Treatment of *Income* in Excess of the Standard of Need," (emphasis added) (Pet. App. 93). This clearly signifies that only insurance proceeds which constitute income are subject to the rule.

Proceeds from a home insurance policy, paid after a fire to replace a resource, have not been subject to the lump sum income rule under Virginia or HHS policies, precisely because they do not represent "income" to the recipient. Even if all "insurance proceeds" were subject to the lump sum rule, the term "insurance proceeds" cannot be equated with "personal injury awards." A recipient who receives a personal injury award may or may not receive the award from an insurance company of the tortfeasor. He may be just as likely to receive it directly from the tortfeasor or some other person.

It is also significant that neither the House nor Senate reports mentions "insurance proceeds" as an example of lump sum income. Although the committee reports adopted much of the Secretary's language in describing the scope of the lump sum rule, the absence of any reference to insurance proceeds cannot be overlooked and must be considered indicative of Congress' intent. Nowhere in the committee reports are "insurance proceeds" even mentioned.

Finally, contrary to the interpretation which Virginia and HHS now urge, until only a few months ago, HHS has

never required that all states treat all insurance proceeds as lump sum income. Consistent with the principle that proceeds from any conversion of property are not income, Virginia has always treated property insurance proceeds as a resource. Thus, the Secretary's statements in May, 1981, were not adopted by Congress, Virginia, *or* HHS.

C. *The Agency Pre-OBRA Definition*

The Secretary's own longstanding and consistent definition of the term "income" in the AFDC program strongly supports the conclusion that personal injury awards are not subject to the lump sum income rule. For at least twenty-five years preceding the OBRA amendments, the only kinds of payments that HHS and its predecessors consistently *defined* as "income" were those payments that represent accumulated gain, such as retroactive social security benefits. On the other hand, the federal agency did not define compensatory payments—such as personal injury awards—as income. Congress must be presumed to have been aware of these established definitions when it adopted the lump sum income rule in 1981. *Heckler* v. *Turner,* 105 S.Ct. at 1144; *Merrill, Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U.S. 353, 382, n.66 (1966).

The agency's pre-OBRA definition of "income" is found in several documents. In 1957, HHS's predecessor, the Department of Health, Education and Welfare ("HEW") was requested to explain its position on a state policy similar to the present $1,000 resource limit. The state allowed public assistance recipients to accumulate a personal property reserve of either $300 or $600, derived from sources such as retroactive social security benefits, insurance, and industrial compensation payments. Handbook of Public Assistance, Part IV, S-3120, Supplement

for Administrative Use (Sept. 6, 1957) (hereinafter "Handbook") (J.A. 58).

In offering an opinion on this policy, HEW used the term "lump-sum" to mean a payment that does not constitute income and therefore could be retained as resources in the personal property reserve:

> For example, the initial retroactive [Social Security] payment representing an accumulation of current monthly benefits would not under Bureau policy represent a "lump-sum". In a like fashion, industrial compensation payments representing accumulated weekly amounts would not be thought of as "lump-sum" payments. On the other hand, a settlement of industrial compensation as the result of loss of hand or foot might represent a "lump-sum" payment.

Id.

It is clear from this usage that "lump-sum" is used to mean a payment that is not income, as opposed to a single payment of monthly benefits that may arrive in one lump payment but is really income. Thus the only logical meaning of "lump-sum" as used here is a payment that is *not* income.[6]

In these examples offered by HEW, both the retroactive social security benefits and accumulated workers compensation payments are income; the social security payment is an accumulation of monthly benefits and the workers compensation is an accumulation of weekly bene-

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[6] In its brief, HHS makes much ado about the wording in the 1957 Handbook that a settlement of industrial compensation "might" be a lump sum payment which is not income. The significance of this quotation is that while retroactive payments representing weekly or monthly amounts were, as agency policy, *defined* as income, compensatory awards were not so defined.

fits paid for lost wages. In contrast, the compensation payment for loss of hand or foot—which HEW states could be retained in the personal property reserve—is *not* income. If it were income it could not have been offered as an example of money retainable in the resource reserve.

Sixteen years later, in June, 1973, the Office of General Counsel stated that this Handbook provision continued to reflect *current* policy (J.A. 55-56) ("It is clear from the explanation in Handbook IV-S-3120 that an initial OASDI payment representing an accumulation of current monthly benefits. . . is to be treated . . .as current income. This interpretation still reflects current policy . . . .").

HEW once again used injury awards as an example of lump sums that are not income in an *amicus* brief submitted in *Lockhardt* v. *Harden*, No. C74-390A (N.D. Ga. 1974). *See* excerpt from Brief on Behalf of United States as Amicus Curiae (J.A. 60).

The plaintiff in *Lockhardt* argued that a lump-sum payment of child support should not have been treated as income because it was not regularly recurring. *Id.* at 10. In rejecting as too restrictive the notion that only regularly recurring payments are income, HEW explained its own distinction between lump sums that are properly treated as income and those which are treated as resources.

As a contrast to lump-sums such as retroactive social security benefits that are income by definition, HEW offered the example of an injury award. Discussing social security benefits, HEW explained,

> The Secretary, however, has traditionally interpreted the regulation as requiring that such a lump-sum payment (*as opposed to a "true" lump-sum payment such as an award for damages*) be treated as

> income in the month received . . .and any portion then remaining be treated as a reserve in the following month.

Id. at 10 (emphasis added).

Thus, HEW stated that payments of retroactive social security benefits are *by definition* income and must be treated as such by states. An award for damages did not meet this definition and was treated as a resource. These distinctions offered by HEW in its Handbook and in the *Lockhardt* brief utilize the same common definition of the word "income" that was discussed previously. When gain occurs, income is realized—compensatory payments are not income.

In compliance with these pre-OBRA federal policies, Virginia treated the receipt of personal injury awards as a *resource* and counted the lump-sum in relation to the $600 limitation. ADC Manual § 303.5 (J.A. 23). On the other hand, Virginia's regulations that related to the treatment of "income" contained no reference to personal injury awards.

Thus, it must be presumed that Congress, when enacting § 602(a)(17) in 1981, knew of HHS's consistent position that personal injury awards were *not* defined as income. By limiting the scope of the rule to "income," and by specifying in Committee reports that the rule affected only "payments that meet the definition of income (e.g., retroactive social security benefits)," Congress made clear its intent that the lump sum provision would not apply to personal injury awards.[7]

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[7] The Secretary has not disputed that the agency's established definition of "income" prior to OBRA did not include compensatory awards. Yet he claims that states have been allowed to treat such awards as either "income" or "resources." (HHS brief, p. 15). But this

By limiting the application of the amendment to receipts of "income", Congress achieved the purposes of the lump sum rule—to encourage recipients to budget large sums of "income" to meet needs over a longer period of time and thereby reduce federal expenditures for the AFDC program.

In fact, the cost-savings goals of the OBRA amendments may be undermined by the interpretation advanced by Virginia and HHS. Additional expenditures for the welfare programs may result because there is no incentive for victims to bring personal injury cases. The victim receives no compensation for injuries or pain since the agency requires the use of the funds—dollar for dollar—in lieu of AFDC. People who are aware of this result may ignore their rightful claims for redress because there is no reason to pursue them.

The government could actually lose a significant source of revenue because personal injury awards are used to reimburse the Medicaid program for medical treatment provided victims of injury. If there is no incentive for bringing personal injury suits, this significant source of third party payment for Medicaid expenditures may shrink. Only the tort defendant would benefit.

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hardly helps the Secretary. First, there is no evidence in the record which documents the existence of a pre-OBRA option. With the exception of the word "might" in the 1957 Handbook provision, Virginia and HHS can only point to post-OBRA documents in support of its claim that an "option" was permissible (Pet. Brief, 4 n.2, 12). If an option did exist, some states (unlike Virginia) may have treated personal injury awards as income, but that does not change the longstanding *federal* definition of income that Congress presumably accepted when it passed OBRA.

D. *Weight To Be Given The Agency Interpretation*

The Secretary seeks to deflect the force of his pre-OBRA definition by suggesting that deference is owed to his new lump sum regulation, 51 Fed. Reg. 9191, 9196-97 (March 18, 1986) (J.A. 86), which classifies *all* large payments of money, including personal injury awards, as "income" subject to the lump sum rule. While courts generally should give deference to agencies' interpretations of statutory language, such deference is neither so uncritical nor so absolute as HHS asserts.[8] The weight to be accorded the agency's interpretation in this type of case, "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which gave it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

HHS's new regulation is not entitled to deference here for the same reasons this Court rejected the agency inter-

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[8] Cases cited by HHS such as *United States* v. *Morton*, 467 U.S. 822 (1984), and *Atkins* v. *Rivera*, 106 S.Ct. 2456 (1986) involve explicit statutory delegations to the agency to define terms. *Morton*, 467 U.S. at 834; *Atkins*, 106 S.Ct. at 2461. The administrative interpretations were given legislative effect and controlling weight. That principle does not apply here, since Congress did not specifically delegate to HHS the authority to define or redefine "income" when it adopted the lump sum income rule in 1981. This case is also unlike *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which involved the interpretation of a complex new concept about which the agency has special expertise. Instead it is an amendment to an existing statute. The word "income" appears elsewhere in the statute, and the agency has previously interpreted the term. It must be assumed that Congress intended the same definition to apply to the amendment.

pretation in *General Electric* v. *Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the guideline was promulgated by the agency eight years after the statutory enactment. It was rejected because it flatly contradicted earlier agency pronouncements concerning the same issue. *Id.* at 142-43. The new guideline also conflicted with other indicia of the statute's proper interpretation including the "plain meaning" of the statutory language. *Id.* at 145.

Here, HHS has promulgated a regulation five years after the statutory enactment. The new regulation conflicts with the common-sense meaning of the statutory language used. Furthermore, the Secretary has failed entirely to provide a consistent interpretation of the lump sum amendment. Indeed, since its 1981 enactment, the agency has flip-flopped its position several times. A review of the various conflicting positions HHS has taken over the past five years highlights the agency's inconsistencies and shows why the new regulation should be rejected:

In both the interim and final regulations implementing the OBRA amendments, the lump sum rule applied only to "income" and not "resources." 47 Fed. Reg. 5675 (Feb. 5, 1982) (Pet. App. 68) In these final regulations, the Secretary maintained the longstanding definition of "income" by utilizing "retroactive Social Security Benefits" as the *agency's* single example of payments affected by the lump sum income rule. *Id.* at 5655. The Secretary also noted that Congress had not specified that any change be made in the states' existing practices in defining "income." *Id.* at 5656.

In discussing another OBRA provision regarding resources, the Secretary reaffirmed that the conversion of a "resource" into cash results in "resources," not income:

> Comment: one commenter questioned whether money received from the sale of allowable resources is exempt.
>
> Answer: As the term resources includes non-liquid assets, the change from a non-liquid asset, e.g., a bicycle valued at $50 to cash of $50 through the sale of that asset, does not change the total value of the assets held and such resource would be exempt if the allowable statutory amount were not exceeded.

Id. at 5657.

Later, in policy memoranda, HHS took a new position that states had an *option* to treat personal injury awards as either resources or as income subject to the lump sum income rule. As early as April 1982, some states were advised of this option. *See* Letter from Acting Regional Commissioner (April 8, 1982) ("damage claims settlements may be considered at the state's option either as income subject to [the OBRA lump-sum rule] or as a resource only") (J.A. 62). More than a year later HHS advised a Congressman of the option. *See* HHS Memo regarding letter from Congressman Douglas H. Bosco (July 6, 1983) (J.A. 46-47).

However, petitioner presented evidence below which indicated that Virginia was not advised about an option until October, 1983 (J.A. 66-67). Prior to that time, the same federal official had advised Virginia that the lump sum rule *had* to apply to accident settlements. *See* Affidavit of Connie Hall, (Jan. 24, 1984) (Record Appendix 134, 163-164).

Effective October 1, 1984, Congress amended 42 U.S.C. § 602(a)(17) to allow states to shorten the disqualifications imposed under the lump sum income rule under certain hardship situations. Pub. L. 98-369, § 2632. In this amendment, Congress also clarified that the lump

sum income rule applied to families whether or not they had earned income,[9] but no change was made to extend the scope of the rule to anything but lump sums of "income." Likewise, the Secretary's regulations which implemented these 1984 statutory amendments continued to refer only to "lump sum income." 45 C.F.R. § 233.20(a)(3)(ii)(F); 49 Fed. Reg. 35600 (Sept. 10, 1984) (Pet. App. 69).

Two months later, without any direction or authorization from Congress, and while this litigation and similar cases around the country were pending, the Secretary proposed new regulations to revise his interpretation once again. 49 Fed. Reg. 45558 (Nov. 14, 1984) (J.A. 79). The proposed regulations would require states to treat all "windfall" payments as income. While maintaining his longstanding definition of retroactive benefit payments as "income" in the preamble to these proposed regulations, the Secretary defines "windfalls" as follows:

> A windfall is a sum that is not earned, does not occur on a regular basis, and does not represent accumulated monthly income received in a single sum. A windfall might come from an inheritance, lottery winnings, or an income tax refund, but not title II Social Security or VA benefits . . .

(J.A. 79).

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[9] The Courts of Appeal for the First and Sixth Circuits had ruled that the lump sum rule applied to all families on AFDC whether or not family members had earned income. *Walker* v. *Adams*, *741 F.2d 116, 120 (6th Cir. 1984) Sweeney* v. *Murray*, 732 F.2d 1022, 1030 (1st Cir. 1984). The Secretary misstates the holding in *Walker* (HHS Brief 17). The Sixth Circuit neither considered nor evaluated whether insurance settlements are income in the AFDC program. The case involved an entirely different question, i.e. whether the rule applied to families without earned income.

In the language of the proposed regulation itself, the Secretary included "inheritances or lottery winnings" as the only two examples of "windfall" payments which must be treated as lump sum income (J.A. 81). The treatment of personal injury awards was not referred to in any way in these proposals, although litigation on that question was pending around the country.

Nine days later the Court of Appeals for the Third Circuit specifically held that under Pennsylvania law personal injury awards could *not* be defined as "windfalls" and could, therefore, not be considered lump sum income under Pennsylvania's AFDC regulations which applied the lump sum rule only to accumulated income and "windfalls." *Barnes* v. *Cohen*, 749 F.2d 1009, 1017-18 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985).

For more than one year, the Secretary took no action on his proposed regulations. When the final regulation was issued sixteen months later (and after the petition for a writ of *certiorari* was filed by Virginia in this case), the description and language of the amended lump sum rule was drastically different from the original proposal: "personal injury awards" were specifically included as an example of "windfalls" which had to be treated as lump sum income by all states. 45 C.F.R. § 233.20(a)(3)(ii)(F). 50 Fed. Reg. 9205 (March 18, 1986) (J.A. 86). The only explanation for the change is that in "reviewing the legislative history of OBRA, we believe that the Congress [in 1981] intended all lump sum payments (including windfalls) to be treated as income under the AFDC program." *Id.*

The last revision in the Secretary's various interpretations of the lump sum rule was expressed in his brief filed in this case. There, the Secretary states that the new

lump sum income regulation applies to casualty loss payments as well as personal injury awards. (HHS Brief 9-10, 18-19). This interpretation has never before been mentioned or suggested by the agency, and it is unsupportable. Even the Petitioner's brief on the merits makes no mention that the new regulations effect such a change. Virginia states throughout its brief that money from property is a resource. (Petitioner's Brief 3, 19, 22)[10]

This new position totally contradicts previous policy statements issued by the agency that money received due to the loss or sale of real or personal property is a *resource*. The question of the character of money received upon sale of a resource was specifically addressed by HHS in the "Supplementary Information" published in the Federal Register with the final AFDC regulations implementing the OBRA amendments concerning resources. *See* 47 Fed. Reg. 5657 (Feb. 5, 1982) (quoted above). This policy has been upheld by at least one court, *Rochford* v. *Affleck*, No. 82-0470 (D.R.I. 1982) (consent order) (lump sum income rule is not applicable to proceeds from the sale of real or personal property—such proceeds are treated as "resources" for AFDC purposes) (Res. App. 1a)

In November, 1982, Virginia DSS inquired of HHS whether the Rhode Island consent decree reflected federal policy. The response from HHS contains the following explanation:

> Situation: The State of Rhode Island Court recently ruled that the proceeds from the sale of real or per-

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[10] The government's interpretation of its new regulations raised issues which have not been addressed by any party at any time in this litigation. In response to the interjection of this new issue, respondents have included material in an appendix to this brief (Res. Brief App.).

> sonal property has to be treated as a resource rather than as Lump Sum Income when determining AFDC eligibility.
>
> Question: What is the federal interpretation of the regulation under 45 C.F.R. 233.20(2)(3) which discusses the treatment of real and personal property?
>
> Answer: Under current Federal policy, real or personal property if sold is considered a converted resource rather than a lump sum payment. . . .

HHS Memo to Virginia DSS (Nov. 15, 1982) (Res. App. 6a). Since the sale of a resource results in a money resource, casualty loss payments for the loss of property, must, also, result in the receipt of a resource. The position taken in HHS's brief is absolutely unsupportable as a statement of new policy.

In sum, the Secretary's numerous policy interpretations since the enactment of OBRA contradict each other, as well as the pre-OBRA agency interpretation. Indeed, even while seeking deference from this Court, the Secretary is taking inconsistent positions. First, he claims that as the agency intimately involved in the drafting and adoption of the OBRA amendments in 1981, HHS's interpretation of the lump sum rule is entitled to special deference. Now, five years later, he replaces the agency's first interpretation with a new one which contradicts the first. No deference to the agency is warranted under these circumstances. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142-145 (1976); *Haggar* v. *Helvering*, 308 U.S. 389, 398 (1940) (refusing to give "persuasive force to an administrative construction" of a statute where, *inter alia*, the administrative "regulations have not been consistent in their interpretation of the statute"); Sands, *Sutherland Statutory Construction*, § 49.05 (4th ed. 1984) (If the administrative construction has not been uniform, "the

rule which attaches great weight to administrative interpretation is inapplicable.)

The only agency interpretation which is entitled to deference here is the longstanding federal interpretation that defines retroactive social security benefits as income. This policy was followed for at least two decades prior to the OBRA amendments and was reaffirmed by Congress in 1981. *See Young* v. *Community Nutrition Institute*, 106 S.Ct. 2360 (1986) (deference given agency interpretation in place for more than 40 years); *Aluminum Co.* v. *Central Lincoln Utility District*, 467 U.S. 380, 390 (1983) (deference to the agency was appropriate because the subject under regulation was technical and complex, and the agency had maintained a consistent interpretation of the statute since its enactment).

In addition to the above, the regulation should be rejected because it was not properly promulgated. Agency regulations, as incorporating agency opinions, are traditionally entitled to the most deference, and for good reason—the Administrative Procedure Act, 5 U.S.C. § 553 *et seq.* (APA) ensures that the administrative interpretations are considered and reasoned to some extent. They are the product of a public process and sometimes judicial scrutiny. *See. e.g. Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (deference to the agency was, in part, supported by the fact that the policy had been adopted after "detailed and informed rulemaking").

Here, however, the new definition of income in the March, 1986 regulations was not subject to any such scrutiny. Indeed, the Secretary's failure in this regard amounts to a violation of the notice requirements of the APA. Its inconsistency with the Social Security Act

aside, the new regulation is not entitled to any deference because it was invalidly promulgated.

The notice of proposed rulemaking stated only that "for AFDC, we plan to classify payments in the nature of a windfall . . . as unearned income from a nonrecurring source and treat them as a lump sum. . . ." 49 Fed. Reg. 45558-70 (Nov. 14, 1984) (J.A. 79-81). The preamble to the proposed rule did not specifically state that HHS would include personal injury awards in its definition of windfall payments. The only examples of "windfall" in the preamble and in the language of the proposal are inheritances and lottery winnings. Despite the fact that courts around the country had already issued inconsistent decisions about the applicability of the lump sum rule to personal injury awards, the words "personal injury" are not contained in *any* part of the notice, and nowhere is any litigation even mentioned.

The final regulation issued sixteen months later contains a significant change from the proposed rule. The final regulation specifies, for the first time, that personal injury awards are income subject to the lump sum rule. 51 Fed. Reg. 9191 (March 18, 1986) (J.A. 85-86). The preamble notes, in response to "several" comments:

> We agree that specifying in regulations how personal injury awards . . . are to be treated is necessary. We, therefore, have amended the regulations to clarify that personal injury awards . . . must be treated as a lump sum income . . .

Id. This radical revision of the proposed rule is far more expansive than the original proposal. It cannot be binding since, contrary to the APA, there was no notice that personal injury awards were to be included in the scope of the proposal, and affected parties did not receive a fair

opportunity to contribute to the administrative rulemaking process.

Section 4 of the APA requires that the notice in the Federal Register of a proposed rulemaking contain "either the terms or substance of the proposed rule or a description of the subject and issues involved." 5 U.S.C. § 553(b)(3). The notice and comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking. *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096 (1980). Courts have been strict in reviewing an agency's compliance with this procedural rule. *Id.* at 641. *See also Weyerhauser Co.* v. *Costle*, 590 F.2d 1011, 1025-28 (D.C. Cir. 1978) (although a court defers to an agency's technical judgments, it is less hesitant to reject the agency's interpretation of statutes, and in reviewing an agency's procedural integrity, the court relies on its own independent judgment). The notice must be sufficiently descriptive to provide interested parties with a fair opportunity to comment and to participate in the rulemaking. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

"The question of adequacy of notice where a proposed rule is changed after comment . . . requires careful consideration on a case-by-case basis." *BASF*, 598 F.2d at 642. The test utilized by courts is whether the changes "are in character with the original scheme," and the final rule is a "logical outgrowth" of the notice and comments already given. *Id. See also Chocolate Manufacturers Ass'n* v. *Block*, 755 F.2d 1098, 1105 (4th Cir. 1985).

Here, the final regulation is neither in character with the original scheme nor a logical outgrowth of the notice

and comments given. HHS made no reference to personal injury awards in its proposed "windfall" regulation. The examples of windfalls given in the notice—lottery winnings and inheritances—are obviously the type of unexpected gain to the winner or beneficiary or "stroke of good luck" which is commonly considered a "windfall." *See Websters New World Dictionary of the American Language*, 2d College Edition, 1980. On the other hand, the Secretary, as a party in litigation around the country, knew well that whether personal injury awards constitute a windfall, income, or a resource was a hotly debated question.

While "several" comments were received about personal injury awards, this does not cure the defect in the notice. As one court has said:

> As a general rule, [an agency] must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment. The APA does not require comments to be entered on a public docket. Thus, notice necessarily must come—if at all—from the agency.

Small Refiner Lead Phase-Down Task Force v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (emphasis in original).

Furthermore, according to the brief description of the comments received on this issue, not one commenter suggested to HHS that the agency characterize personal injury awards as income. On the contrary, "several" commenters suggested that personal injury settlements be treated as a resource (J.A. 85). On the question of windfall payments, twenty-four commenters suggested that the agency maintain flexibility and the option allowing states to treat such payments as income or resources (J.A. 83). Thus, the expansion of the final regulation was contrary to

all comments received and contrary to the only two circuit court decisions which had been issued at that time.[11]

The entire rulemaking was extremely secretive and misleading. The process used by HHS amounts to "regulation by ambush," a process which violates the very spirit of the APA. *Kennecott* v. *EPA*, 780 F.2d 445, 452 (4th Cir. 1985). The procedures used by HHS to promulgate the new regulation should be condemned, and the regulation given no deference whatsoever.

II. THE TREATMENT OF PERSONAL INJURY AWARDS AS INCOME IS ARBITRARY AND UNREASONABLE AND VIOLATES THE AFDC EQUITABLE TREATMENT REGULATION.

As described above, Virginia treats one kind of monetary exchange as a "resource" (replacement of property) and another kind of exchange as "income" (personal injury awards). Thus, a person who sells his car for $1,000 is permitted to keep all of that money, while a child whose body is mangled in an accident must be terminated from public assistance. The results punish those unfortunate

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[11] In *Barnes* v. *Cohen*, 749 F.2d 1009, 1017-18 (3d Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2126 (1985), the Third Circuit specifically held that personal injury awards were not "windfalls" under state law and could not be treated as lump sum income in Pennsylvania's AFDC program. The new regulation appears to be a last ditch attempt to reverse *Barnes* v. *Cohen* despite this Court's declination of *certiorari* in that case. Of course, in the case below, the Fourth Circuit held that Congress did not intend the lump sum income rule to reach payments for personal injury. 774 F.2d at 1275. The new regulation was not considered by the Seventh Circuit, even though the decision was issued one month after its publication. *Watkins* v. *Blinzinger*, 789 F.2d 474 (7th Cir. 1986). Thus, the 7th Circuit upheld only the policy which afforded states the *option* of treating personal injury awards as either income or resources.

families whose members have suffered severe bodily injury while families which have experienced a mere material loss are not so penalized.

This regulatory scheme not only runs afoul of the Act itself, see Argument Section I, *supra*, but also violates the Secretary's own regulation which prohibits such arbitrary and inequitable treatment. 45 C.F.R. § 233.10(a)(1) specifies that:

> [The state plan must] specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and *the eligibility conditions imposed must not exclude individuals* or groups *on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals* or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act . . . .

(emphasis added) (Pet. App. 66)

This regulation is commonly referred to as the "equitable treatment" regulation. Based upon this provision and upon the Secretary's interpretation of it, this Court recently invalidated a New York state regulation which excluded AFDC recipients from that state's emergency assistance program. *Blum* v. *Bacon*, 457 U.S. 132, 138 (1982). Like *Blum*, here an entire category of individuals are disqualified from the program for reasons which are neither reasonable nor equitable.

In his brief the Secretary takes the position, without citing any authority, that respondents' equitable treatment claims are moot because his March, 1986, regulation now requires states to treat personal injury awards *and* casualty loss payments as lump sum income. There is no

basis for this position. The invalidity of the new regulation and the Secretary's interpretation are discussed previously and will not be repeated here. See Argument Section ID, *supra*.

Further, assuming *arguendo* that the interpretation is a legitimate one, respondents' claims are not moot because the disparate treatment between property damage and personal injury awards continues. The Secretary says that individuals who use their casualty loss payments to repair or replace the lost or damaged property may regain eligibility. This opportunity is totally unavailable to individuals who receive personal injury awards who have no ability to replace lost limbs, or buy a healthy body, or repair their pain and suffering.

Finally, the equitable treatment claim is not moot because respondents retain a personal stake in the outcome of their claim. *Firefighters* v. *Stotts*, 467 U.S. 561, 569-71 (1984); *Powell* v. *McCormack*, 395 U.S. 486, 496-98 (1969). The district court below issued a prospective injunction, enjoining Virginia and HHS from treating personal injury awards as lump sum income. The Fourth Circuit's affirmance of the relief ordered by the district court was based, in part, on the court's finding that Virginia and HHS had violated and were still violating the equitable treatment regulation. Both courts stayed class relief pending the appeals. The correctness of the relief ordered from October, 1984, through March 18, 1986, remains a live issue today.

Virginia has not viewed the March 1986 regulation as requiring casualty payments to be treated as "income" nor as mooting respondents' claim. Instead, petitioner attempts to defend its policy which is described as follows:

> Under Virginia [AFDC] rules, property damage awards are treated differently [from personal injury

> awards]. Property damage awards are considered the equivalent of the property that was lost and, thus, are counted as a "resource" exempt or partially exempt from consideration in determining a potential recipient's need for benefits.

(Pet. Brief 3).

Thus, according to the Virginia policy, had respondents lost a home or a car instead of suffering bodily injury, they could have received AFDC benefits again when their remaining funds fell below resource levels. Virginia's arbitrary and unreasonable regulation, however, has resulted in *absolute* disqualifications from the program which have continued long after *all* the family's funds were gone.

When evaluated "in light of the provisions and purposes of the public assistance titles of the Social Security Act", as required by § 233.10, there is no justification for the inequitable treatment of individuals who receive personal injury awards. The stated purpose of the AFDC program is to:

> furnish financial assistance . . .to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self support in personal independence consistent with the maintenance of continuing parental care and protection . . .

42 U.S.C. § 601.

Certainly, the financial need of a dependent child whose mother has been injured in a car accident is no different than the need of the child whose mother's car is wrecked in an accident. In fact, it is likely that the needs of the child in the family where injury has occurred are greater. The parent may suffer impairments which temporarily or permanently interfere with employment or education. The

injury may require special therapy or equipment, and periods of treatment or hospitalization may keep family members apart.

Yet Virginia takes the position that there is nothing wrong with denying financial aid to the needy child whose mother has been injured in a car accident, even when the family has no money at all. These eligibility conditions arbitrarily deny certain children desperately needed financial assistance and totally frustrate the purpose of the Act to provide financial assistance to *all* needy children. *See King* v. *Smith*, 392 U.S. 309, 330 (1968).

Virginia has failed to offer any rational justification for the distinction made between personal injury and property damage awards. Virginia first explains that payments for property damage are not treated as lump sum income because it is assumed that individuals will use the money to replace the lost property. However, as Virginia concedes, there is no requirement imposed upon recipients of property damage payments that the property actually be replaced. The assumption is, therefore, invalid.

Second, Virginia claims that the distinction became rational when it adopted the DEFRA option in November, 1985. The disqualification period can now be shortened if the disqualified family documents that the lump sum funds have been expended on certain hardship needs, including medical treatment. This attempt to justify the disparate treatment also fails. The policy still places a restriction on persons who cannot go into the market to replace losses due to pain and suffering. The shortening provisions also do nothing to cure the arbitrariness of the system since the latent consequences of the personal injury, such as relapses or the need for

special equipment may fall *outside* the disqualification period. Under Virginia's rule the injured person can not prepare for these contingencies by setting aside funds up to the allowable resource limit. Furthermore, the inequity continues in a very practical sense because the injured recipient, told he must use the personal injury award for subsistence living expenses for months into the future, will have to forego medical treatment in order to meet immediate expenses for the family's survival.

The Fourth Circuit rejected each of Virginia's attempts to rationalize the distinction between property damage and personal injury awards and concluded that the regulatory scheme was "inequitable" and contrary to the "regulations aimed at ensuring fair and unarbitrary treatment." 774 F.2d at 1275 (Pet. App. 16).[12] Virginia's eligi-

[12] While the Seventh Circuit conceded that treating personal injury awards as income is "not . . . always desirable," and "may produce harsh results," and "may be heartless," *Watkins*, 789 F.2d at 482-83, the court answered the equitable treatment argument by claiming that all that the regulation need do is to "treat like alike," *id.* at 481. *Watkins* offers two justifications for treating personal injury awards like income. First, the court states that personal injury awards are "more similar to wages or other gross receipts than to other exhanges." *Id.* at 482. But in reality, personal injury awards are much more similar to property damage awards than they are to wages. Personal injury awards and payments from property are intended primarily as replacement, while wages are intended primarily as gain.

The second justification of the Seventh Circuit is that when a property damage award is received, this "does not change the family's command over real resources," and the family does not have "greater market opportunities at its disposal." *Id.* at 481. However, a property damage award may indeed give a family greater command over real resources, for example, when the value of the resource has increased over time due to inflation or market conditions. Furthermore, the Seventh Circuit discounts the fact that our healthy bodies are resources as real as refrigerators or cars. Compensation for loss of one's resources merely returns the individual to his former position.

bility conditions totally ignore the purposes of the Social Security Act and arbitrarily deny certain children desperately needed financial assistance. The Court of Appeals was entirely correct:

> This effect is inequitable and puts the injured recipient in an untenable position when compared to the recipient who has lost a more concrete and tangible resource. The AFDC program was designed to assist the needy; the state by imposing inequitable eligibility requirements thwarts that purpose and runs afoul of regulations aimed at ensuring fair and unarbitrary treatment. *See* 45 C.F.R. § 233.10(a)(1).

Id. (Pet. App. 16).

This Court should affirm these conclusions to bring an end to Virginia's policies which aggravate the hardship of needy families whose parents or children have already suffered a personal injury.

CONCLUSION

When Congress adopted the lump sum income rule in 1981 it expressed the intent to apply the rule to income and not to all large payments of money. Recognizing this, from the rule's implementation and continuing today, Virginia has not applied the rule to large payments that are properly characterized as a resource. Thus, individuals who receive AFDC benefits may receive fair value for their homes or cars or benefit from their own insurance policies without being forced to use those funds for their subsistence.

But families who have experienced severe personal injury as a result of another's wrongdoing are treated differently and harshly. When they receive fair compensation for the damage done to them, their AFDC benefits are automatically terminated for a fixed period of time.

These families must use their compensatory awards to survive.

The inequity here is harsh and irrational. Respondents are seeking fairness and logic, as Congress must certainly have intended when it expressly limited the application of the lump sum rule to payments of income. By applying the rule to accumulated income, such as retroactive benefits, which have been characterized as income by HHS for decades, or other lump sum payments which represent a true gain to the family, Congress achieved the purposes of the OBRA amendments. Federal dollars are saved. Families that receive lump sums of income learn to budget their money.

The Secretary has tried for five years to go beyond the Congressional purpose. First states were given an "option" to ignore the statutory limits on the lump sum income rule. Now, the Secretary, through his rulemaking powers, has attempted to erase the distinction between income and resources in the AFDC program—a distinction which very clearly continues to exist in the Social Security Act.

In this instance, this Court can not allow the federal agency to change its policies and ignore the language of the statute. Deference is particularly inappropriate in light of HHS's efforts to disguise its real objectives in its recent rulemaking and its 11th hour revisions in regulations, on the eve of review by this Court.

The judgment of the Fourth Circuit must be affirmed.

Respectfully submitted

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APPENDIX

APPENDIX

United States District Court

FOR THE
DISTRICT OF RHODE ISLAND

C.A. No. 82-0470

JEANNETTE ROCHFORD, CAROL RODRIGUES, MANUELA PAJARO, Individually and on behalf of all others similarly situated,

Plaintiffs

v.

JOHN J. AFFLECK, individually and in his Capacity as Director of the Rhode Island Department of Social and Rehabilitative Services,

Defendant

CONSENT ORDER

The parties to this action consent, stipulate, and agree to, and by its entry of this Order the Court orders, the following:

1. Defendant will immediately review the eligibility of named plaintiffs for AFDC benefits, and in making such review will treat the proceeds from the sale of each plaintiff's resources as a resource, not as "income." If such review results in a determination that a named plaintiff is eligible for AFDC benefits, such benefits will be paid forthwith, and without limiting such plaintiff's claims and rights under the remaining terms of this Order.

2. Defendant will immediately promulgate regulatory amendments to SRS *Manual*, §§ 206, pp. 1-9, and 207, pp. 23-25, as follows:

(1) § 206, pp. 1-9 will be amended to delete any references to the proceeds from the sale of any real or personal property or other assets or resources as "income." Further, the policy of § 206, pp. 1-9, as amended, will specify that the "lump-sum" policy is not applicable to proceeds from the sale of real or personal property or other assets or resources. The policy as amended will reflect that such proceeds are treated as "resources" for AFDC purposes, and that when such proceeds, together with other non-exempt resources, are reduced to below the applicable non-exempt resource limit, eligibility for AFDC may be re-established provided other eligibility criteria are met; and current rules allowing documentation of reduction or exhaustion of resources by affidavit remain in effect and controlling in cases involving proceeds from the sale of real or personal property or other non-liquid resources.

(2) § 207, pp. 23-25 will be amended to delete any reference to proceeds from the sale of any real or personal property or other resources or assets as "income" or "lump-sum income" for AFDC purposes, and the policy, as amended, will specify that such proceeds are not "income" or "lump-sum income" for AFDC purposes.

Immediately upon the execution of this Consent Order, defendant shall take steps to notify his employees who administer the AFDC program in Rhode Island of the impending changes in SRS regulations specified in this paragraph, and shall direct said employees not to apply "lump-sum income" policy in those situations where AFDC recipients realize proceeds from the sale of real or personal property or other non-liquid resource.

3. Defendant will immediately undertake to identify all present and/or past recipients of AFDC who, while receiving AFDC benefits, realized proceeds from the sale of real or personal property or other non-liquid resource, and who had the "lump-sum income" policy of SRS *Manual*, § 207, pp. 23-25 applied to such proceeds. Such identification of present and/or past recipients of AFDC shall be made with respect to all persons who have received AFDC benefits in Rhode Island since the current "lump-sum income" policy of SRS *Manual*, § 207, pp. 23-25 was promulgated in November, 1981.

4. With respect to each person identified under the terms of Paragraph 3, above, defendant will:

a. Make all reasonable and diligent efforts to determine the present or most recent known address;

b. Send a notice, a copy of which is attached hereto and entitled "Mail Notice"; and

c. Carry out the terms of the "Mail Notice."

5. With respect to claims for prospective or retroactive benefits by any present or former recipient made in response to and under the terms of the "Mail Notice," and with respect to any administrative hearing or judicial review if such claims are initially denied, the policy that will apply shall be the revised policy promulgated under the terms of Paragraph 2, above, notwithstanding the fact that periods for which such claims are made may partially or wholly predate the promulgation of such policy, and notwithstanding the fact that more than thirty days have passed since the recipient received notice of SRS' planned termination of benefits and application of the "lump-sum income policy." Defendant shall provide a copy of this Consent Order to his administrative hearing officer.

6. In the event that defendant pays retroactive AFDC benefits under the terms of this agreement to any person who is, at the time of his/her receipt of such retroactive benefits, a recipient of AFDC benefits, such retroactive benefits shall in no case be considered "income" or "lump-sum income" to the recipient for any month, and shall not be considered a resource in either the month such retroactive payment is received or the following month.

7. The following time limits shall apply to the above provisions:

a. The promulgation and effectuation of regulations specified as Paragraph 2, above, shall be completed on or before September 1, 1982.

b. The "identification" and "location" of recipients specified in Paragraphs 3 and 4(a), above, respectively,

shall be completed by September 30, 1982, and the notice required under Paragraph 4(b) shall be sent by that date.

8. For past or present AFDC recipients who are identified, located, and sent notices under the terms of Paragraphs 3 and 4, above, the time limits contained in the "Mail Notice" shall be controlling with respect to such recipients' claims for benefits. With respect to past or present recipients who are not so identified, located, and noticed, the time limits contained in the "Mail Notice" do not apply and do not limit the right of such persons to make claims for prospective or retroactive benefits under other provisions of this Consent Order.

9. Defendant agrees to provide to plaintiffs' counsel descriptions of methods used by defendant in identifying present and past recipients under Paragraph 3 and locating such persons under Paragraph 4, and summaries and numbers of persons identified under Paragraph 3 and located and noticed under Paragraph 4, and, on written request from plaintiffs' counsel, any other information reasonably related to monitoring of defendant's compliance with the terms of this Consent Order. Plaintiffs' counsel agrees to make all reasonable efforts to make requests for such compliance-monitoring information in a manner and at such times as to minimize the burden on defendant.

10. Plaintiffs waive any and all claims for attorney's fees for work done through the date of the execution of this Consent Order by the parties, and for work done in connection with compliance-monitoring, as set forth in Paragraph 9 above; provided, however, that plaintiffs' claims for fees are not waived with respect to future litigation involving any questions of defendant's compliance with the terms of this Consent Order, including, but not limited to, defendant's compliance with the terms of Paragraph 9, above.

/s/_____

BARRY BEST
Rhode Island Legal Services, Inc.
77 Dorrance Street
Providence, Rhode Island 02903

/s/_____

RONALD A. LEBEL
Deputy Chief Legal Counsel
Department of Social and Rehabilitative Services
600 New London Avenue
Cranston, Rhode Island

ENTER:
/s/_____
JUDGE

PER ORDER:
/s/_____
CLERK

DATE August 10, 1982

DEPARTMENT OF HEALTH & HUMAN SERVICES
Refer to: SD3A1 Nov 15 1982

Social Security Administration
Region III
PO Box 8788
3535 Market Street
Philadelphia PA 19101

Constance Hall
Chief, Division of Benefit Programs
Richmond, Virginia 23288

Dear Ms. Hall:

This is in response to inquiries received from your staff concerning AFDC policy.

* * *

Situation: The State of Rhode Island Court recently ruled that the proceeds from the sale of real or personal property has to be treated as a resource rather than as Lump Sum Income when determining AFDC eligibility.

Question: What is the Federal interpretation of the regulation under 45 CFR 233.20 (2)(3) which discusses the treatment of real and personal property?

Answer: Under current Federal policy, real or personal property if sold is considered a converted resource rather than a lump sum payment. . . .

* * *

Sincerely,
Lois Mapp
State Program Specialist

Enclosure

No. 85-1358 (13)

Supreme Court, U.S.
FILED
DEC 19
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER
VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER,
OPAL MAE COOK, STELLA KING, AND ALL
OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

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No. 85-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER
VIRGINIA DEPARTMENT OF SOCIAL SERVICES,
Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER,
OPAL MAE COOK, STELLA KING, AND ALL
OTHERS SIMILARLY SITUATED,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

The central issue presented in this case is whether personal injury awards may properly be treated by the Commonwealth of Virginia as "income" in determining eligiblity for benefits under the Aid to Families with Dependent Children (AFDC) program. In enacting the lump sum rule at issue here, 42 U.S.C. § 602(a)(17), Congress referred to the receipt of "income," but did not define the term. The Court must therefore ascertain the intent of Congress and interpret such section accordingly.

The respondents point this Court to three sources of authority for ascertaining the intent of Congress: (1) the plain and ordinary meaning of "income," (2) the legislative history of the provision, and (3) the federal agency's (U.S. Department of Health and Human Services [the Department]) longstanding definition of the term. An analysis of such authorities, however, clearly supports the conclusion that Virginia's treatment of personal injury awards as "income" for purposes of the lump sum rule is consistent with Congressional intent in enacting 42 U.S.C. § 602-(a)(17).

I.

TREATMENT OF PERSONAL INJURY AWARDS AS "INCOME" SUBJECT TO THE LUMP SUM RULE IS CONSISTENT WITH THE SOCIAL SECURITY ACT

A.

The Plain And Ordinary Meaning Of "Income"

In their brief, respondents advance the argument that Congress, in enacting 42 U.S.C. § 602(a)(17), intended the word "income" to have its "plain and ordinary" meaning (Respondents' Brief at 13). Such argument presupposes that the word "income" does, in fact, have a definitive meaning. Respondents, like the court of appeals, turn to the dictionary and other general references as the most authoritative sources to determine that meaning. A thorough review of such sources, however, reveals that the word "income" is not a static term with a fixed, common meaning. Rather, it is a flexible concept which has different meanings dependent upon the connection in which it is used.

For example, the *Oxford English Dictionary, Volume V* (1961 ed.) describes income "in its usual acceptation" as "a loose and vague term; it applies equally to gross receipts and to net produce." *Id.* at 162.

The *Webster's Encyclopedic Dictionary of the English Language* (1967 ed.) provides the term's literal definition as "that which comes in." *Id.* at 431. *Webster's New International Dictionary,* (Second Ed.), declares income to be synonymous with gain, revenue and receipts. *Id.* at 1258. Likewise, *Noah Webster's Original 1828 Ed. of an American Dictionary of the English Language* states that income and revenue are often used synonymously.

The *Random House College Dictionary* (Rev. Ed. 1975) defines income as "[t]he monetary or equivalent returns that come in periodically." *Id.* at 673.

The *Encyclopedia Americana,* a common, reliable resource since 1829 declares: "[t]here are many definitions of income" 14 ENCYCLOPEDIA AMERICANA, *Income,* 843 (1986). For the common man, such term is defined as "money receipts available for expenditure," *id.,* but a businessman "will define income in a more complicated way." *Id.*

The economist's definition is different yet: the increase in one's economic power between two points in time.[1]

Finally, *Corpus Juris Secundum* defines the term generally or ordinarily to mean "all that comes in." 42 C.J.S. *Income,* 528, 529 (1944).

The inescapable conclusion, after a thorough review of the sources available to find the ordinary or common meaning of the word "income," is that there is no such universally understood or accepted meaning. The concept of "income" is

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[1] "In general terms, income is the flow of MONEY for goods accruing to an individual, groups of individuals, a firm or the economy over some time period. It may originate from the sale of productive services (as wages, interest, profits, rents . . .), it may represent a gift (e.g., a legacy from a will or income from a trust fund) or a transfer payment (e.g., a welfare check)." (Emphasis in original.) Auld, Bannock, Baxter and Rees, *The American Dictionary of Economics* 142 (1972); "Personal income is often used interchangeably with disposable income." ECONOMIC ENCYCLOPEDIA, *Income,* 186 (1973).

indeed an economic abstraction. Within that concept there are both broad and narrow meanings. Within the broader, more common meanings of the term, the proceeds from a personal injury award clearly are "money receipts available for expenditure," and "that which comes in." Such awards just as obviously represent an accretion in the recipient's *economic* power.

The word's meaning in a specific context, however, such as the complex legislative scheme at issue here, can only be determined by examining the connection in which it is used and the result intended to be accomplished. *See Heckler v. Turner,* 105 S.Ct. 1138 (1985).[2] Thus attempting to define the meaning of "income" within the context of the AFDC program by reference to the term's meaning within other unrelated and narrow contexts, such as the tax code, is inappropriate. Indeed, even its meaning in relation to its use in the tax laws is evasive and changing as this Court has long recognized.

In *Eisner v. Macomber,* 252 U.S. 189 (1920), this Court defined income as "the gain derived from capital, from labor, or from both combined." *Id.* at 207. But when faced with the question of whether money received as exemplary or punitive damages constituted gross income under § 22(a) of the Internal Revenue Code of 1939 in *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426 (1955), this Court refused to be limited by such earlier definition. This Court held that in the context of the *Eisner* case, the definition served a

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[2] *See also Kokoska v. Belford,* 417 U.S. 642, 645 (1974), (". . .[i]t is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others. . . . In determining the term's scope—and its limitations—the purpose of the Bankruptcy Act must ultimately govern. . . .")

useful purpose. However, "[i]t was not meant to provide a touchstone to all future gross income questions." *Id.* at 431.[3]

> Chief Justice Cardozo has stated it thus: "The truth is that what is income in one relation may at times be principal in another. 'Words,' as we are told, 'are flexible.'"

In Re: Kaplan's Will, 88 N.Y.S. 2d 851, 853 (1949)

The respondents fail, therefore, in their search for a common and ordinary definition of income. Indeed, if one exists at all, it is a broad concept which includes that portion of a personal injury award that is money available for expenditure and which represents an increase in the recipient's *economic* power.

B.

Legislative History

In proposing the lump sum rule to Congress, the Administration was quite clear in articulating its objectives. By encouraging individual responsibility (J.A. 54, 65, 74) (Pet. App. 90) and eliminating the perverse effect of encouraging recipients of public assistance to spend money quickly to

---

[3]The House of Representatives in 1918 may have expressed doubt whether compensation for sickness or injury was *required* to be included as gross income (H.R. Rep. No. 767, 65th Cong., 2d Sess. 9-10 (1918)) (Respondents' Brief at 14-15), but impliedly it conceded such payments were by specifically excluding them from consideration as gross income. In the years after 1918, the Internal Revenue Service appears to have regarded the exemption as a freeing from tax of something which would otherwise quite properly be taxed. *See* Knickerbocker, *Income Tax Treatment of Damages*, 47 Cornell Law Review, 431-432, 439 (1962); *see also*, Surrey and Warren, *The Income Tax Project of the American Law Institute*, 66 Harvard Law Review 761 (1953), which includes in the definition of income the proceeds of personal injury awards and thereafter excludes them from consideration as gross income.

retain or regain eligibility (J.A. 75)[4], the Administration attempted to conserve federal resources by targeting assistance to those most in need (J.A. 70, 71, 72, 73, 74) (Pet. App. 90). In describing the specific proposal, Secretary Schweiker repeatedly spoke in terms of the receipt of "large sums of money" received by recipients (J.A. 54, 65, 74) (Pet. App. 93) and repeatedly stated "we will *consider* it as income. . . ." *Id.* The Secretary used as examples of lump sum income such receipts as insurance proceeds, inheritances, and retroactive social security payments, *id.*, all of which fall within the broader definitions of income heretofore discussed.

Yet respondents argue that Congress intended that only payments which met some narrow, but unarticulated definition of income were intended to be included in the lump sum rule, suggesting that Congress in fact rejected the Administration's proposal. Respondents argue as evidence of this rejection that fact that neither the House nor Senate Committee documents (J.A. 24, 75) (Brief App. 24) mentions insurance proceeds" as an example of lump sum income but gives retroactive social security benefits as their sole example. The lack of an exhaustive list of examples by the Committees is paltry evidence to support the conclusion that Congress rejected the Administration's proposal. Additionally, such reference to retroactive social security benefits by the Committees is used as an example of the then existing law. When describing the proposal, however, the Committees spoke in terms of "large payments." *Id.*

It should further be noted that a number of social security payments typify precisely the type of payment respondents argue is not income. A retroactive social security disability payment, for example, is ostensibly to compensate individuals for physical or mental impairment that prevents

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[4]The document at J.A. 75 was incorrectly cited in Petitioner's Brief at p. 15. The correct citation is: *House Comm. on Ways and Means*, 97th Cong., 1st Sess., Tax Aspects of the President's Economic Program, 265-266 (1981).

substantial gainful employment. (42 U.S.C. § 423). It is not derived from "capital, from labor or effort, or both combined," represents no more or no less "profit" than a person being compensated for the loss of earning capacity by a personal injury award. Yet, respondents concede a retroactive disability payment is properly treated as income.

The most compelling evidence of Congress' aceptance of the Administration's proposal, however, lies in the fact that the language of the adopted amendment was virtually identical to that proposed by the Administration (J.A. 68). If Congress intended to reject or restrict the Administration's proposal in any way, it logically would have amended the language of the bill proposed to it by the Administration to reflect such disagreement. *See generally Young v. Community Nutrition Institute,* 90 L.Ed.2d 959 (1986). Not having done so, Congress must have intended the word "income" to have a broad meaning in accord with the clearly articulated purposes of the lump sum rule, a meaning which includes personal injury awards.

C.

The Department's Pre-OBRA Policy

Respondents also advance the argument that the Department's long-standing pre-OBRA definition of "income" in AFDC excluded personal injury awards. Thus, they argue, Congress is presumed to have been aware of such definition and must have intended that definition to continue. Respondents, however, are wrong as a matter of fact.

Prior to OBRA, the Department required certain payments to be considered as "income," such as an initial OASDI payment or industrial compensation payments which represented accumulated current benefits (J.A. 55-56). This designation was based upon a distinction between payments that represented an accumulation of benefits paid

on a regular basis, and those payments that were *non-recurring.* This position was clearly articulated by the Department in its *amicus curiae* brief in *Lockhart v. Harden,* No. C74-390A (N.D. Ga. 1974), which respondents misread and thus misinterpret. (Respondents' Brief at 26.) In that brief, the Department stated:

> Plaintiff's theory rests on this Court's decision in *Carr v. Saucier,* C.A. No. 16, 704, May 29, 1973. In that case it was held that 45 C.F.R. § 233.20(a)-(3)(ii)(c) requires that a lump sum OASDI payment representing accumulated monthly benefits be considered as a resource, not as income on *the ground that such a payment is not "regularly available."* . . . A lump sum payment such as an OASDI lump sum or a child support arrearage payment *is viewed as an accumulation of income accruing on a regular basis* and therefore countable as income.[5]
>
> (J.A. 60-61.) (Emphasis added.)

Non-recurring payments were labeled "lump sum payments" or "windfall" payments. An example of such a lump sum payment given by the Department in 1957 was a settlement of an industrial compensation claim as a result of a loss of a hand or foot—a personal injury-type award (J.A. 58). As to those lump sum payments, states were permitted the choice of treating them either as income or as a re-

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[5] *See also* Letter to Carl H. Harper from Elizabeth A. Crogg, Deputy Chief Assistance Branch (J.A. 55): "With regard to the specific issue in the present case, the initial OASDI payment has been viewed as an accumulation of income paid *on a regular basis,* and, therefore, countable as income." (Emphasis added.)

source.[6] If defined as "income" by a state, a payment such as a personal injury award would then be counted as "income" in the month of receipt and thereafter any remaining funds would be counted as a resource that could be spent without restriction. If defined by a state as a resource, it would only affect eligibility until it was spent. If spent immediately, it would likely not affect eligibility for AFDC benefits.

Thus, when the Senate Finance Committee used the phrase "any payments that meet the definition of income are counted as income in the month of receipt. . . ." to describe the then existing policy (J.A. 24), it was reflecting this long-standing Department policy. If the state chose to define a particular nonrecurring lump sum payment as "income," then for purposes of application of AFDC policy, it was so treated as described by the Senate Finance Committee.

As the Secretary himself has noted (J.A. 84) in the regulatory rulemaking process, Congress could not have intended to maintain or change a specific definition of lump sum "income" that was universally applied throughout the AFDC program since none existed. 51 Fed. Reg. 9191, 9197 (March 18, 1986). If, however, as respondents suggest, Congress enacted the lump sum rule with the intent of preserving the Department's treatment of personal injury awards, then they must have intended that personal injury awards could be treated as income subject to the lump sum rule since such treatment was consistent with the agency's longstanding policy. *Young v. Community Nutrition Institute,* 90 L.Ed.2d 959, 968 (1986).

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[6] *See* Handbook of Public Assistance Administration (J.A. 58) which deals with the ability of states to permit "lump sum payments" to be accumulated by the recipient as a personal property reserve; Letter to Constance O. Hall from Lois J. Mapp (J.A. 66) ("Based on long-standing precedent, states have historically had the option to consider nonrecurring lump sum payments as either unearned income or resources."); 51 Fed. Reg. 9191, 9197 (March 18, 1986) (J.A. 82) ("Twenty-four commentors expressed concern about this provision suggesting that flexibility remain with the states to determine whether to count payments in the nature of a windfall as income or resources.")

II.

TREATMENT OF PERSONAL INJURY AWARDS AS "INCOME" SUBJECT TO THE LUMP SUM RULE DOES NOT VIOLATE 45 C.F.R. § 233.10(a)(1) (THE EQUITABLE TREATMENT REGULATION)

In its brief in support of the Petitioner, the Department addresses the court of appeal's holding concerning the different treatment given personal injury awards and casualty loss awards as a moot point in light of the Department's new rules. These rules, the Department declares, now require states to treat awards for casualty loss and personal injury similarly. (Department's Brief at 18-19.)

Respondents challenge such rules and the interpretation of the Department.[7] This Court, however, should not be diverted from the central issue in this case, that is, the proper treatment of a lump sum personal injury award. Whether casualty loss awards are properly treated as income or resources is not an issue before this Court. Furthermore, for purposes of this appeal, neither treatment conflicts with the "equal treatment" regulation. (45 C.F.R. § 233.10(a)(1).)

Petitioner firmly believes, as he has previously argued to this Court, that Virginia's different treatment of property casualty awards and personal injury awards is rational and advances legitimate governmental objectives and is thus sustainable under established constitutional standards of

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[7] Respondents suggest in their brief that petitioner disagrees with these rules or the interpretation. Such suggestion is erroneous. Petitioner, in his opening brief, defended Virginia's policy of treating casualty loss awards and personal injury awards differently because that was Virginia's policy at the time the appeal was heard and decided by the court of appeals. The State Board of Social Services did on December 18, 1986, move to amend Virginia's policy in accordance with the Department's new rules by ordering publication of a Notice of Intent to Amend in accordance with Virginia's Administrative Process Act.

review. *Schweiker v. Wilson,* 450 U.S. 221 (1981); *Jefferson v. Hackney,* 406 U.S. 535 (1972). Such position is not inconsistent with the Department's new rule requiring property casualty awards to be treated as income subject to the lump sum rule. Indeed, Virginia's current rule and the new rule of the Department are substantially similar. The federal rule requires both personal injury and property casualty awards to be considered lump sum income, but further requires a state to disregard any amount that is earmarked and used for the purpose for which it is paid. Thus, for a recipient whose home is destroyed by fire, any award covering such loss would not be subject to the lump sum rule to the extent the money received actually is used to repair or replace the home.

Virginia's current rule regarding property casualty awards gives the recipient the same opportunity to repair or replace the home. The only difference is that the recipient will now be required to produce evidence that the funds were spent for the purpose for which they were intended whereas Virginia currently assumes that the funds will be so spent. Such assumption, which the court of appeals erroneously found objectionable, is not unreasonable or irrational. Under the Department's new rule, however, the objection of the court of appeals is met.

Respondents contend, however, that either treatment of casualty loss awards results in inequitable and arbitrary treatment because the *opportunity* to replace lost limbs, buy a healthy body, or repair pain and suffering is not available to a recipient of a personal injury award. (Respondents' Brief at 42-46.) Neither Congress, the Department, nor the petitioner can create that which is not humanly possible. To the extent that a recipient can replace a lost limb with a prothesis, however, Virginia provides for such expenses to be deducted from the amounts of the award subject to the lump sum rule. To the extent medical treatment can offer an injured recipient a return to health,

those expenses are likewise disregarded.[8] Realistically, however, there exists no way to restore pain and suffering at any price. Thus, individuals in clearly different situations are treated equally to the extent possible. To encourage recipients of personal injury awards to spend monies representing pain and suffering or lost earning capacity quickly on consumer goods or nonessential activities would do nothing to create greater equality. In fact, to require recipients of a casualty loss award to repair or replace the lost resource in order to avoid disqualification which the Department has now done, while permitting recipients of a personal injury to so spend their award on consumer goods, entertainment, or travel, would create greater inequality between the two classes.

III.

CONCLUSION

The word "income" does not have a fixed meaning but rather is a flexible concept, with both broad and narrow meanings depending on the context within which it is used. If a common, ordinary meaning exists at all, it is one which includes all that comes in and is available to be spent. It is clear, however, from the legislative history and administrative background of the lump sum rule that Congress intended the word "income" to have a broad meaning to include inheritances, gifts, social security benefits, and personal injury awards. There is no evidence that Congress intended to exclude personal injury awards from the lump

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[8] Respondents complain that even with the DEFRA revisions of 1984, (Pet. App. 64) enacted by the Virginia Board of Social Services in November 1985 and which allows for the shortening of the period of ineligibility for after incurred medical expenses, (Pet. App. 84-88) the need for special equipment or latent medical consequences may fall outside the disqualification period (Rep. Brief 44-45). Respondents ignore, however, that once requalified for AFDC, a recipient is automatically entitled to Title XIX medicaid assistance which would meet these potential medical expenses.

sum rule. For many years the Department permitted states to treat such awards as income at their discretion. Congress, presumed to be aware of such treatment, did nothing to indicate it rejected such treatment. The result is inescapable that consideration of personal injury awards as "income" subject to the lump sum rule is consistent with the Social Security Act.

The proper treatment of casualty loss awards is not before the Court. Treating personal injury awards as income, however, does not violate the equal treatment regulation, regardless of whether casualty loss awards are treated as they currently are by Virginia, or in accordance with the Department's new rule.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM L. LUKHARD, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, PETITIONER

v.

ONA MAE REED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES AS RESPONDENT SUPPORTING PETITIONER

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REPLY BRIEF FOR THE SECRETARY OF HEALTH AND HUMAN SERVICES AS RESPONDENT SUPPORTING PETITIONER

The Aid to Families with Dependent Children (AFDC) part of the Social Security Act (Title IV, Part A of the Act, 42 U.S.C. (& Supp. II) 601 *et seq.*), establishes a cooperative federal-state assistance program for "needy" dependent children and the persons who care for them. *Shea* v. *Vialpando*, 416 U.S. 251, 261 (1974). To ensure that only the most impoverished families receive this assistance, however, the Act requires that participating states, "except as may be otherwise provided in [the statute], * * * take into consideration *any* other income and resources" of a family unit in determining its eligibility for AFDC benefits (42 U.S.C. (Supp. II) 602(a)(7)(A) (emphasis added)), and prorate over a future period the "amount of earned or unearned income which, together with all other income for that month not [expressly required to be disregarded by the

statute], exceeds the State's standard of need * * *" (42 U.S.C. (Supp. II) 602(a)(17)). The Act charges the Secretary of Health and Human Services (Secretary) with the responsibility for interpreting and enforcing these requirements (see 42 U.S.C. (Supp. II) 602(a), 1302) and, in that role, the Secretary has determined that participating states can and should treat personal injury and workers' compensation awards as "income" for benefit eligibility computation purposes. See 51 Fed. Reg. 9205 (1986) (to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F)); J.A. 58-59, 62-63, 66-67. This Court's precedents require that the Secretary's determination be sustained unless it is unreasonable, even if some observers might find another interpretation of the statute "more natural." *Young* v. *Community Nutrition Institute*, No. 85-664 (June 17, 1986), slip op. 6; *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9-10, 17; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). Respondents have not come close to showing that the Secretary's determination is unreasonable.

1. Respondents first claim (Br. 12-19) that, because personal injury and workers' compensation awards produce no "gain or profit," the Secretary's treatment of such awards cannot be reconciled with the "plain and ordinary" meaning of the term "income." This contention is unfounded.

The term "income" simply has no "plain and ordinary" meaning—at least not in the singular sense of "gain or profit" (as respondents suggest). See Resp. Br. 13-15. "Income" is a term "having different meanings, dependent upon the connection in which it is used and the result intended to be accomplished." *Ballentine's Law Dictionary* 601 (3d ed. 1969); accord, *Merrick* v. *Delavan Engineering Co.*, 243 Iowa 39, 48, 50 N.W.2d 586, 591 (1951); *Fullerton* v. *Central Lincoln People's Utility District*, 185 Or. 28, 32,

201 P.2d 524, 526 (1948); *Equitable Trust Co.* v. *Prentice*, 250 N.Y. 1, 11, 164 N.E. 723, 725 (1928). Thus, while the term "income" sometimes refers to receipts which produce "gain or profit," that is not always the case.[1] See *Watkins* v. *Blinzinger*, 789 F.2d 474, 476-478 (7th Cir. 1986). And, as we noted in our opening brief (at 17), this Court's decision in *Heckler* v. *Turner*, 470 U.S. 184 (1985), makes clear that the AFDC program's use of the term "income" is not limited to receipts producing "gain or profit." Accordingly, the Secretary's determination that personal injury and workers' compensation awards can and should be treated as

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[1]Indeed, the very sources that respondents cite (Br. 13-15) confirm this point. Leading dictionaries in fact state that a *more* preferred use of the term "income" refers to all receipts, not just those producing "gain or profit" to the recipient. See *Webster's Third New International Dictionary* 1143 (1976 ed.) (defining "income" as "something that comes in as an increment or addition[,] usu[ally] by chance"); *Black's Law Dictionary* 687 (5th ed. 1979) (defining "income" as "[t]he return in money from one's business, labor, or capital invested," including but not limited to "gains, profits, salary, wages, etc."); see also 42 C.J.S. *Income* 528, 529 (1944) (footnote omitted) ("Generally or ordinarily the term ["income"] means all that comes in * * *."). Likewise, as shown in our opening brief (at 17-18 & n.4), the term "income" is used in the Internal Revenue Code, the Food Stamp Program, and the federal poverty guidelines in an all-inclusive sense. See 26 U.S.C. (& Supp. II) 61(a) ("gross income" in the Internal Revenue Code means "all income from whatever source derived"); 7 U.S.C. 2014(d) ("Household income for purposes of the food stamp program shall include all income from whatever source [derived]"); 48 Fed. Reg. 7010 (1983) (Income "[r]efers to total cash receipts before taxes from all sources."). Amounts received as personal injury awards are excluded from "income" in these programs only by express provision. See 26 U.S.C. 104(a) (Internal Revenue Code exclusion); 7 U.S.C. 2014(d)(8) (Food Stamp Program exclusion); 48 Fed. Reg. 7011 (1983) (poverty guidelines exclusion). Such exclusions would be unnecessary if the "plain and ordinary" meaning of the term "income" was limited, as respondents suggest, to receipts producing "gain or profit."

"income" is not rendered unreasonable by the fact that such awards may not produce "gain or profit."[2]

2. Respondents next contend (Br. 20-22) that the legislative history of the 1981 amendment to the Act shows that Congress intended to exclude personal injury and workers' compensation awards from the definition of "income" in this statute. This contention also has no merit.

As discussed in our opening brief (at 11-12, 14-16), the legislative history of the 1981 amendment reveals that, in 1981, Congress was troubled that the then "present treatment of [lump-sum] payments ha[d] the perverse effect of encouraging the [AFDC] family to spend such income as quickly as possible in order to retain AFDC eligibility." S. Rep. 97-139, 97th Cong., 1st Sess. 505 (1981) (Budget Committee Report). Congress responded to this problem by adopting the Secretary's proposal that states be required to prorate over future periods any lump-sum income received by an AFDC family—at least to the extent that the sum of the lump-sum payment and any other income available to the family exceeded the state-defined standard of need. See Staff of House Committee on Ways and Means, 97th Cong., 1st Sess., *Description of the Administration's Legislative Recommendations Under the Jurisdiction of the Ways and Means Comm.* 53 (Comm. Print 1981); Staff

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[2]In any event, respondents err in suggesting (Br. 15-19) that, because such awards are compensatory in purpose, personal injury and workers' compensation awards cannot produce "gain or profit." "Much of the value of [a personal injury or workers' compensation] award may represent lost wages, past and future." *Watkins* v. *Blinzinger*, 789 F.2d 474, 476 (7th Cir. 1986). Similarly, much of the remainder of any such award—attributable to pain and suffering, property damage, and/or bodily mutilation—may "reflect loss in future market opportunities" (*id.* at 476-477). To this extent, "the award for the loss therefore is a substitute for * * * [reduced potential] earnings" (*id.* at 477), and thus constitutes "income" in even the narrow sense in which respondents seek to confine the term.

of Senate Committee on Finance, 97th Cong., 1st Sess., *Proposals for Reductions in Spending Programs Under the Jurisdiction of the Senate Finance Committee* 33 (Comm. Print 1981). The legislative history makes no mention of any exclusion for personal injury or workers' compensation awards.

To be sure, both the 1981 amendment and its legislative history indicate that Congress intended the new proration requirement to apply only to a family's excess "income." See 42 U.S.C. (Supp. II) 602(a)(17); House Comm. on Ways and Means, 97th Cong., 1st Sess., *Tax Aspects of the President's Economic Program* 265 (Comm. Print 1981); S. Rep. 97-139, *supra*, at 505. Thus, Congress may not have intended for the proration requirement to apply to all large payments of money. Cf. Resp. Br. 20-21. But Congress did not define which large payments of money would constitute "income" for this purpose. Rather, as the Seventh Circuit has recently concluded, "[t]he most that can be said is that Congress did not prescribe any restriction on the definition" of lump-sum income (*Watkins* v. *Blinzinger*, 789 F.2d at 480) and that Congress instead "committed to the Secretary and the states" the task of defining which large payments would be included within that term (*id.* at 483). Accord *Barnes* v. *Cohen*, 749 F.2d 1009, 1017 (3d Cir. 1984).

Therefore, respondents plainly err in suggesting (Br. 20-21) that Congress intended for the proration requirement to apply only to payments reflecting accumulated gain. The Senate Finance Committee Report from which respondents quote clearly uses retroactive social security payments only as an *example* of a lump-sum payment that would be subject to proration. See S. Rep. 97-139, *supra*, at 436. Moreover, when the Senate Finance Committee Report states that, "[u]nder present law, any payments that meet the definition of income * * * are counted as income" (*ibid.*), it does so against a background in which some states

had been defining "income" to include gifts, inheritances, lottery winnings, damage claim settlements, and other insurance benefits. See J.A. 47, 58-59, 62-63, 66-67. These lump-sum payments plainly do not reflect accumulated gain. As noted in our opening brief (at 15), "[t]here is no reason to suppose that the Congress that enacted [the proration requirement] legislated in ignorance of" how states were treating these lump-sum payments—to wit, as "income." *Heckler* v. *Turner*, 470 U.S. at 197.

3. Respondents attempt to avoid this inevitable interpretation of congressional intent by suggesting (Resp. Br. 22-27) that the Secretary's pre-1981 amendment "definition" of "income" did not include personal injury or workers' compensation awards. But this suggestion is clearly incorrect.[3] As noted above, while the Secretary *required* states to treat lump-sum payments representing accumulated gain as "income" prior to 1981, he clearly also *permitted* states, in the spirit of "cooperative federalism" (*King* v. *Smith*, 392

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[3]Respondents' suggestion (Br. 26-27) that treating personal injury and workers' compensation awards as "income" will undermine the cost-savings goals of the 1981 amendment is equally mistaken. Personal injury and workers' compensation awards are subject to proration only to the extent they are not precommitted to other uses—such as attorney fees, back medical bills, Medicaid reimbursements, funeral expenses, and burial costs. See 51 Fed. Reg. 9205 (1986) (to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F)). Therefore, receipt of a personal injury or workers' compensation award will disqualify a family from receiving AFDC benefits only if, and to the extent, the amount remaining after these expenses are paid exceeds the state's standard of need. On that basis, the Secretary has quite reasonably determined that AFDC families will continue to have sufficient incentives to bring personal injury and workers' compensation suits and that, on balance, prorating the excess of any awards they receive therein will reduce the cost of the AFDC program. 51 Fed. Reg. 9196-9197 (1986) (estimating that requiring states to treat all lump-sums, including personal injury and workers' compensation awards, as "income" subject to proration will save the federal government $1 million annually). Respondents' contrary suggestion is unfounded.

U.S. 309, 316 (1968)), to treat personal injury or workers' compensation awards as "income." See J.A. 46-47, 58-59, 62-63, 66-67, 82-85. This is the administrative "definition" of "income" that Congress must have been aware of and approved when it enacted the proration requirement in 1981. See *Heckler* v. *Turner*, 470 U.S. at 197; *Young* v. *Community Nutrition Institute*, slip op. 9; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

4. Respondents also err in arguing (Br. 27-38) that the Secretary's position concerning the appropriate treatment of personal injury and workers' compensation awards in state AFDC benefit eligibility determinations has been inconsistent and, accordingly, is entitled to no deference.

Respondents' argument (Br. 28-29, 34) is based on a false premise: that the Secretary first allowed states the option to treat personal injury and workers' compensation awards as "income" after Congress enacted the 1981 amendment. As noted above and in our opening brief (at 15 & n.3), the Secretary actually has permitted states the option to treat personal injury and workers' compensation awards as "income" since at least 1957. See *Watkins* v. *Blinzinger*, 789 F.2d at 481 & n.7; see also J.A. 46-47, 58-59, 62-63, 66-67, 82-85. This long-standing practice led the Secretary to approve petitioner's treatment of respondents' personal injury and workers' compensation awards as "income" in this case; it is entitled to deference and is itself sufficient reason for reversal of the judgment below. See *Young* v. *Community Nutrition Institute*, slip op. 9; *CTFC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 11; *Haig* v. *Agee*, 453 U.S. 280, 297-298 (1981).

In any event, respondents err in suggesting (Br. 29-38) that the Secretary's 1986 regulation is not entitled to this Court's deference. As noted in our opening brief (at 16),

prior to 1981, it made little difference whether certain nonrecurring lump-sum payments—which the Secretary traditionally termed "windfalls"—were treated as "income" or as "resources"; if not dissipated in the month of receipt, all such "windfalls" became "resources" in the following month and potentially disqualified a family from receiving AFDC benefits. Thus, recognizing that states have "legitimate local policies in determining eligibility" (*Batterton* v. *Francis*, 432 U.S. 416, 431-432 (1977)), the Secretary allowed states the option to treat lump-sum "windfalls" as either "income" or "resources." The 1981 amendment, however, made the distinction between "income" and "resources" one with important consequences; if treated as "income," the "windfall" could disqualify a recipient family from receiving AFDC benefits for several months. The states responded to this new rule differently and, after a spate of litigation resulted, the Secretary determined that for the first time the Act's orderly administration required a uniform definition of the term "income." See 49 Fed. Reg. 45558, 45561 (1984). Thus, contrary to respondents' argument (Br. 29-31), it was the Act's 1981 amendment (and the administrative problems associated with it) which provided the impetus and need for the Secretary's 1986 regulatory action.

Respondents' contention (Br. 9 n.2, 31-32 & n.10, 37 n.11) that, because he is involved in litigation on the issue, the Secretary cannot resolve by regulation whether the term "income" encompasses personal injury awards is simply wrong. "Congress authorized the issuance of regulations so that problems arising in the administration of the statute could be addressed. Litigation often brings to light latent ambiguities or unanswered questions that might not otherwise be apparent. Thus, * * * [w]hen [the agency] responded to this problem by issuing regulations[,] it was doing no more than the task which Congress had assigned it." *United States* v. *Morton*, 467 U.S. 822, 835-836 n.21 (1984).

Respondents' argument (Br. 31-33) that the 1986 regulation departs from prior policy statements of the Secretary is also mistaken. The 1986 regulation simply does not, as respondents mistakenly assert, require states to treat lump-sum payments received from the sale of real or personal property as "income." To the contrary, the 1986 regulation requires states to treat only lump-sum "windfalls" (and accumulated gains) as "income." See 51 Fed. Reg. 9205 (1986) (to be codified at 45 C.F.R. 233.20(a)(3)(ii)(F)); see also 51 Fed. Reg. 9196-9197 (1986). The Secretary has never characterized proceeds from the sale of property as lump-sum "windfalls." See 47 Fed. Reg. 5648, 5657 (1982). By contrast, the Secretary has traditionally characterized casualty loss and personal injury/workers' compensation awards as lump-sum "windfalls." See J.A. 62-63, 66-67. The final regulation thus requires states to treat personal injury/workers' compensation and casualty loss awards (but not proceeds from the sale of property) as "income"—at least to the extent such awards are not precommitted to other uses. See 51 Fed. Reg. 9205 (1986). In short, the Secretary's treatment of personal injury/workers' compensation awards, casualty loss awards, and proceeds from sale of property has been completely consistent over the years.[4]

Finally, there is no merit to respondents' claim (Br. 31, 34-38) that the Secretary promulgated this regulation in violation of the Administrative Procedure Act's "notice and

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[4]Personal injury and casualty loss awards, like lottery winnings and inheritances, and unlike the proceeds from property sales, reflect an element of chance—fortunate or unfortunate. The 1986 regulation reflects the Secretary's new determination that AFDC families reasonably can (and should) be expected to budget awards associated with chance; these families have funds available to them that otherwise similarly situated families—*i.e.*, families who have suffered the same loss or made a similar payment (for an insurance policy or lottery ticket), but who have received no payoff of chance—do not have. The Secretary's determination is a rational one and is entitled to the deference of this Court. See *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

comment" requirements. When the Secretary published the proposed regulation in the Federal Register, he indicated that the regulation would require states to treat all lump-sum "windfalls" as "income" for purposes of the proration rule. See 49 Fed. Reg. 45561 (1984). The Secretary has characterized personal injury and workers' compensation awards as "windfall" payments since at least 1957. See J.A. 58; see generally J.A. 46-48, 62-63, 67-68. Accordingly, several commentators specifically questioned whether the Secretary intended to require proration of personal injury or workers' compensation awards and, if so, whether such proration was fair or necessary. See 51 Fed. Reg. 9197 (1986). The Secretary responded to these comments both by stating that proration of personal injury awards "is consistent with Congressional intent that nonrecurring lump-sum payments be used to meet current as well as future needs" and by amending the regulation's wording to "clarify the policy and avoid future misunderstanding as to the[] [appropriate] treatment" of such awards (*ibid.*). While respondents may not agree with the Secretary's decision, they plainly err in suggesting that the final regulation was not "a 'logical outgrowth' of the original proposal and the notice and comments upon it." *Kennecott* v. *EPA*, 780 F.2d 445, 452-453 (4th Cir. 1985), cert. denied, No. 85-1741 (Oct. 6, 1986) (quoting *American Paper Institute* v. *EPA*, 660 F.2d 954, 959 n.13 (4th Cir. 1981)). See also *Chocolate Mfrs. Ass'n of* v. *Block*, 755 F.2d 1098, 1103-1105 (4th Cir. 1985); *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 643-644 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980). Indeed, the fact that respondents have been litigating since 1983 the question whether the Secretary may allow states to treat personal injury awards as "windfall" income subject to proration makes all the more untenable their claim that the Secretary's 1984 notice of rulemaking was inadequate. See J.A. 9, 21.

5. All that remains, therefore, is to consider respondents' claim (Br. 38-43) that, even if petitioner may treat personal injury and workers' compensation awards as "income" without violating the Act, petitioner has violated the Secretary's "equitable treatment" regulation by subjecting those awards, but not casualty loss payments, to the proration requirement. See 45 C.F.R. 233.10(a)(1). As noted in our opening brief (at 18-19), the promulgation of the Secretary's 1986 regulation renders this claim prospectively moot.[5] Moreover, the claim is without merit. It was clearly Congress's intent both that the states have substantial discretion in defining eligibility requirements in the AFDC program and that the Secretary and courts generally defer to any rational judgment the states make. See *Batterton* v. *Francis*, 432 U.S. at 430-432; *King* v. *Smith*, 392 U.S. at 318; *Dandridge* v. *Williams*, 397 U.S. 471, 478-479 (1970); *Watkins* v. *Blinzinger*, 789 F.2d at 478. Here, petitioner rationally and reasonably determined (Br. 19-20) that AFDC families in its jurisdiction could fairly be expected to budget personal injury and workers' compensation, but not casualty loss, awards. Accordingly, the Secretary has refused throughout this litigation to find that petitioner violated the

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[5]Respondents' arguments concerning why the "equitable treatment" claim is not moot (Br. 39-40) are contradictory. The argument that individuals suffering personal injuries will continue to be treated inequitably because they are less able than individuals suffering casualty losses to repair or replace their lost assets does not show that similarly situated individuals are being treated differently; to the contrary, it urges that the two categories of persons are not similarly situated and thus inadvertently concedes that petitioner has had a reasonable basis for concluding that individuals suffering personal injuries are not similarly situated to persons suffering casualty losses. See *Watkins* v. *Blinzinger*, 789 F.2d at 481-482 ("equitable treatment" regulation requires only that state treat "like things alike"). Thus, on respondents' own terms, they are not entitled to prevail with respect to their "equitable treatment" claim relating to the period of the prospective injunction ordered but stayed during October 1984 to March 1986.

"equitable treatment" regulation. The Secretary's interpretation of his own regulation is entitled to substantial deference from this Court. See *Blum* v. *Bacon*, 457 U.S. 132, 141-142, 145-146 (1982); see generally *Lyng* v. *Payne*, No. 84-1948 (June 17, 1986), slip op. 12-13. Therefore, respondents' claim of "inequitable treatment" should be rejected.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM L. LUKHARD, Commissioner of the Virginia Department of Social Services,

Petitioner,

v.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, and all others similarly situated,

Respondents.

BRIEF OF AMICI CURIAE THE STATES OF ILLINOIS, INDIANA, WEST VIRGINIA, GEORGIA, NORTH CAROLINA, SOUTH CAROLINA, AND THE COMMONWEALTH OF PENNSYLVANIA ON BEHALF OF THE PETITIONER

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QUESTION PRESENTED

Whether the receipt of a personal injury award qualifies as income under the Aid to Families with Dependent Children program's "lump sum rule," codified at 42 U.S.C. §602(a)(17), which Congress enacted to correct a disincentive against family budgeting and to retarget scarce public assistance resources.

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BRIEF OF AMICI CURIAE THE STATES OF ILLINOIS, INDIANA, WEST VIRGINIA, GEORGIA, NORTH CAROLINA, SOUTH CAROLINA, AND THE COMMONWEALTH OF PENNSYLVANIA ON BEHALF OF THE PETITIONER

The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania as *amici curiae* respectfully join in the Petition of William L. Lukhard, Commissioner of the Virginia Department of Social Services, in requesting that a writ of certiorari issue to review the judgment entered October 10, 1985, of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF INTEREST

The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania have a direct financial and public policy interest in the outcome of this case. Each *amici* has a "single state agency" designated to administer the State plans for Title IV of the Social Security Act, known as the Aid to Families with Dependent Children program. 42 U.S.C. §602(a)(3). Included within the operation of this program is the so-called "lump sum rule," whereby nonrecurring lump sum payments are treated as income for purposes of determining eligibility for assistance. 42 U.S.C. §602(a)(17).

Personal injury awards are treated as income under the lump sum rule in these states. This treatment is currently the subject of litigation. *See Davis v. Coler*, 601 F. Supp. 444 (N.D. Ill. 1984), *appeal pending*, No. 85-2481 (7th Cir. argued Feb. 21, 1986); *Watkins v. Blinzinger*, 610 F. Supp. 1443 (S.D. Ind. 1985), *appeal pending*, No. 85-2366 (7th Cir. argued Feb. 21, 1986); *Miller v. Lord*, No. 85-0500 (N.D. W. Va. preliminary injunction issued on behalf of named plaintiffs May 16, 1985); *Rochester v. Ledbetter*, No. CV 585-132 (S.D. Ga. preliminary injunction denied Jan. 8, 1986); *Finch v. Kirk*, No. 86-90-CIV-5 (E.D. N.C. removed Jan. 21, 1986).

In *Davis* and *Watkins*, the district courts held that the States' treatment of personal injury awards as lump sum income was proper. The Fourth Circuit ruling is in direct opposition to the district courts' decisions in Illinois and Indiana. It is clear that the States have a vital interest in distributing limited fiscal resources to those persons most needy. A holding in the Seventh Circuit similar to that of the Fourth Circuit would sabotage that interest. It is also clear that the States have a strong public policy interest in a uniform interpretation of the law.

REASONS FOR GRANTING THE WRIT

In passing the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub. L. No. 97-35, 95 Stat. 357, Congress enacted various amendments and cutbacks in federally funded programs. OBRA was intended to alter federal fiscal policies and to restrain federal spending "in order to wage an effective battle against the high inflation and unemployment which have plagued the national economy for many years." S. Rep. No. 139, 97th Cong., 1st Sess. 3, *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 398. One of the OBRA amendments, the so-called "lump sum rule," contained in section 2304 of OBRA, codified at 42 U.S.C. §602(a)(17), is the subject matter of this lawsuit and numerous other actions across the nation. The lump sum rule requires states to budget nonrecurring lump sum payments as income for purposes of determining eligibility under the Aid to Families with Dependent Children program ("AFDC"). 45 C.F.R. §233.20(a)(3)(ii)(D).

In regulating the application of the lump sum rule, the United States Department of Health and Human Services has consistently permitted the administering state agencies to include a personal injury award as lump sum income. The Fourth Circuit, however, held that "the lump sum rule may not be applied to personal injury awards to render AFDC recipients ineligible for benefits." *Reed v. Health and Human Services*, 774 F.2d 1270, 1275 (4th Cir. 1985), *petition for cert. filed sub nom. Lukhard v. Reed*, 54 U.S.L.W. 3565 (U.S. Feb. 11, 1986) (No. 85-1358).

Federal courts are not in agreement in their resolution of the issue of whether personal injury awards are subject to the lump sum rule. Several district courts, after

being fully briefed on all of the issues, have correctly decided that such awards are subject to the rule. The courts focused on the purpose of the rule, as expressed by its drafter, and on its legislative history, in the context of the AFDC program.

In *Davis v. Coler*, 601 F. Supp. 444 (N.D. Ill. 1984), *appeal pending*, No. 85-2481 (7th Cir. argued Feb. 21, 1986), the district court found that the purpose of the OBRA amendment to the lump sum rule and the deference to be afforded the Secretary of the United States Department of Health and Human Services' interpretation dictated that, as a matter of law, the state and federal defendant's position was correct. 601 F. Supp. at 452-53. In addition to the court in *Davis*, three other federal district courts have specifically addressed the issue and decided that personal injury awards are properly considered income under the lump sum rule. In *Jackson v. Guissinger*, 589 F. Supp. 1288 (W.D. La. 1984), plaintiff negotiated a $19,000.00 personal injury settlement. The court rejected the contention that the money received should be treated as a resource for purposes of determining eligibility.

In *Watkins v. Blinzinger*, 610 F. Supp. 1443 (S.D. Ind. 1985), *appeal pending*, No. 85-2366 (7th Cir. argued Feb. 21, 1986), the court also refused to treat personal injury awards as exempt from the lump sum rule. The *Watkins* court, like the court in *Davis*, was not led astray in defining "income" for purposes of the rule. Finally, the district court in *Betson v. Cohen*, 578 F. Supp. 154, 159 (E.D. Pa. 1983), *rev'd on other grounds sub nom. Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985), concluded that personal injury awards were not specifically excluded from treatment as income. The court also rejected plaintiffs' effort to exclude such awards based upon the Internal Revenue Code's specific exclusion.

Two Circuit Courts of Appeal, although not specifically addressing the issue raised here, have also treated personal injury awards as countable under the lump sum rule. The plaintiff in *Walker v. Adams*, 741 F.2d 116 (6th Cir. 1984), received an insurance settlement from an automobile accident. The court found that the applicable federal regulation, 45 C.F.R. §233.20(a)(3)(ii)(D), disqualified recipients "when they receive 'lump sum' payments such as an inheritance, disability benefits, an insurance settlement, or a court judgment." 741 F.2d at 119. The court reached this conclusion despite finding that:

> [t]he statute and regulation may indeed produce harsh results to many AFDC recipients (particularly, as in this case, where the lump sum payment would serve to compensate a prior loss).

Id. Similarly, the court in *Sweeney v. Murray*, 732 F.2d 1022 (1st Cir. 1984), recognized that the lump sum rule, 42 U.S.C. §602(a)(17):

> provides that when an AFDC family receives a payment of nonrecurring lump sum income (such as an inheritance, *a personal injury judgment or settlement*, or a workers' compensation award), the family becomes ineligible for AFDC for a prescribed period of time.

732 F.2d at 1024 (emphasis added).

The court in *Reed v. Health and Human Services*, 774 F.2d 1270 (4th Cir. 1985), was wrong when it looked to the Internal Revenue Code and the Food Stamp Act in its efforts to define "income." Simply because the same word is used in various statutes does not mean that its definition is static. The meaning ascribed to the term "income" in the Internal Revenue Code cannot be applied to the term "income" in the AFDC program.

At least one federal district court rejected the *Reed* court's approach and pointed out that the exclusion of personal injury awards as income under the Internal Revenue Code is expressly established by I.R.C. §104(a)(2). *Betson v. Cohen*, 578 F. Supp. 154, 159 (E.D. Pa. 1983), *rev'd on other grounds sub nom. Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 2126 (1985). The court stated:

> Were such a provision not made, such awards could be considered income under the Internal Revenue Code general provision of income, 26 U.S.C. §61(a). *See Roemer v. Commissioner of Internal Revenue*, 716 F.2d 693, 696 n. 2 (9th Cir. 1983) ("Since there is no tax basis in a person's health and other personal interests, money received as compensation for an injury to those interests might be considered a realized accession to wealth" absent the exclusion.) The plaintiffs' argument fails in light of these considerations.

578 F. Supp. at 159.

Thus, a monetary award for damages is income. The Internal Revenue Code, I.R.C. §104(a)(2), and the federal tax regulations, Treas. Reg. §1.104-1, only exclude personal injury awards from consideration as gross income subject to taxation. Neither provision expressly states that such awards are not income. The Internal Revenue Code merely defines that income which is *taxable* and that which is *nontaxable*.

The *Reed* court's approach illustrates the danger of using one statutory term, particularly a term used in a statute as complex as the Internal Revenue Code, to construe a similar term in another statute, the Social Security Act. The definition and application of income, gross income, exclusions from income and so on in the Internal Revenue Code are clearly terms of art, which have been

the subject of continuing legislative amendment and judicial scrutiny. The *Reed* court indiscriminately selected one particular term and pronounced, by analogy only, that its meaning has some greater relevance in determining the application of the term in another statute.

One demonstration of the danger of construing terms in the Internal Revenue Code with terms in the AFDC statute is found in section 102 of the Internal Revenue Code. I.R.C. §102. Section 102 excludes gifts or inheritances from gross income. Under the *Reed* court's analysis, an AFDC recipient could receive a sizable cash gift or inheritance and remain eligible for AFDC.

Finally, where both Congress and the Secretary of Health and Human Services adopt a particular meaning from another statute, they do so expressly. The treatment of the Earned Income Tax Credit provides an excellent example. The amendments to the AFDC program contained in OBRA, the same amendatory legislation which included the lump sum rule, provided that any Earned Income Tax Credit available to an AFDC family is to be factored into the calculation of the AFDC grant. In enacting the Earned Income Tax Credit amendment, Congress explicitly adopted terms and definitions of the Internal Revenue Code. Section 2305 of OBRA amended section 402(d)(1) of the Social Security Act and provided:

> For purposes of this part of [the AFDC statute], an individual's "income" shall also include, to the extent and under the circumstances prescribed by the Secretary, an amount (which shall be treated as earned income for purposes of this part) equal to the earned income advance amount (*under section 3507(a) of the Internal Revenue Code of 1954*), that is (or, upon the filing of an earned income eligibility certificate, would be) payable to such individual.

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §2305, 95 Stat. 845, *codified at* 42 U.S.C. §602(d)(1) (emphasis added).

The Secretary of Health and Human Services promulgated an implementing regulation regarding the Earned Income Tax Credit with an express reference to the Internal Revenue Code. The regulation provides that:

> [t]he State agency shall make the [Earned Income Tax Credit] determination based upon the requirements specified in the *Internal Revenue Code under* 26 U.S.C. §43 and 3507, *and under the corresponding regulations at* 26 C.F.R. §1.43-1, 1.43-2, 31.3507-1 and 31.3507-2, which establish eligibility criteria for receipt of earned income credit and advance payments of the credit.

47 Fed. Reg. 5676 (1982), *codified at* 45 C.F.R. §233.20(a)(6)(ix)(B)(1) (emphasis added).

The failure of Congress to adopt a definition of income from another statute in reference to lump sum payments underscores the flexibility it intended the Department of Health and Human Services and state agencies to have in considering what payments constitute lump sum income. The Fourth Circuit has ignored this flexibility and bound the Virginia agency to an interpretation contrary to the law. The States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania contend that this anomaly should not be permitted.

CONCLUSION

For the foregoing reasons the States of Illinois, Indiana, West Virginia, Georgia, North Carolina, South Carolina, and the Commonwealth of Pennsylvania respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF LEGAL SERVICES OF NORTH CAROLINA ON BEHALF OF ITS CLIENTS IN SUPPORT OF RESPONDENTS ONA MAE REED *ET AL.*

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STATEMENT OF INTEREST

Amicus, Legal Services of North Carolina (LSNC) including two of its affiliate programs, is deeply and intimately concerned about the outcome of this case. LSNC files this brief on behalf of its clients. Two affiliate programs of LSNC currently represent AFDC recipients in an action filed against the North Carolina Department of Human Resources and the United States Department of

Health and Human Services, *Finch v. Kirk*, No. 86-90-CIV-5 (E.D.N.C. Jan 21, 1986), challenging state and federal regulations that treat personal injury awards as "income" rather than as "resources" in determining AFDC eligibility. Class certification is pending in that action.

LSNC is a statewide program responsible for civil representation of low income persons in eighty-three of North Carolina's one hundred counties. Overall, 1.3 million persons in North Carolina are governmentally defined as eligible for legal services. Generally, to be eligible, a family's annual gross income must be less than 125% of the federal poverty line. Legal Services programs in North Carolina receive more than 35,000 requests for assistance from eligible, low income persons each year and provide service to approximately 25,000 of these persons. In North Carolina, 180,000 people receive AFDC benefits. Many of these AFDC recipients rely upon LSNC to protect their interest in continued financial assistance when eligibility criteria are met.

AFDC regulations provide that, when a member of an AFDC household receives non-recurring "lump sum" income, a period of ineligibility is imposed during which AFDC benefits are denied to the entire family. The set period of ineligibility continues even though the lump sum may be exhausted, leaving the family in desperate need of AFDC benefits to meet the basic costs of survival. Although the United States Court of Appeals for the Fourth Circuit held in *Reed v. Lukhard*, 774 F.2d 1270 (4th Cir. 1985), *aff'g* 591 F. Supp. 1247 (W.D. Va. 1984) that "the lump sum rule may not be applied to personal injury awards to render AFDC recipients ineligible for benefits," the State of North Carolina continues to deny, reduce, or terminate AFDC benefits on this basis, thereby depriving many low income families of resources desperately needed for survival.

In the *Finch* action filed by LSNC, plaintiff Finch alleged that she and her minor child were receiving AFDC benefits of $176 per month in June, 1985. She received her monthly AFDC check on June 1, 1985 and spent the check for monthly expenses. On June 4, 1985, Ms. Finch received a $1,200 lump sum insurance settlement for bodily injury sustained in an automobile accident on September 15, 1984. Ms. Finch used part of the money to repay outstanding loans and bills. She also spent her award for transportation expenses, clothing and a few inexpensive toys for her child, and non-Food Stamp items such as cleaning supplies.

Ms. Finch promptly reported the personal injury award to Social Services. Social Services then determined she would be ineligible for June, July and August, 1985 AFDC benefits. It found she would be eligible for partial benefits in September, 1985. However, before termination of her benefits, she had expended her award. During the time that Ms. Finch's AFDC benefits were terminated, she had to pawn part of her furniture in order to meet her living and medical expenses for July and August, 1985.

Upon appeal, the State Department of Human Resources affirmed the termination of her AFDC benefits. It concluded as a matter of law that personal injury awards are income rather than resource and thus are subject to the lump-sum rule.

Plaintiff Hardy and her two minor children were receiving AFDC benefits of $246 per month in November, 1985. The AFDC benefits constituted the family's only source of income aside from $50 per month in support payments from the children's father. Ms. Hardy received her monthly AFDC check on November 1, 1985 and spent the check for monthly expenses. On November 25, 1985, she received a $1,783 lump sum insurance settlement for bodily injury sustained in an automobile accident on

May 22, 1985. She had received medical treatment for her injuries from May through October, 1985.

Ms. Hardy received notice in January 1986, that pursuant to North Carolina's lump-sum policies, her AFDC grant would be reduced from $246 to $184, representing partial benefits for March, 1986. Additionally, a period of recoupment, at a minimum of 10% of the monthly grant, or $24 per month, for approximately the next 40 months, would follow until the AFDC benefits provided to Ms. Hardy for November and December, 1985, and January and February, 1986 were fully reimbursed. The County determined she was ineligible during these months.

Prior to receiving this notice of ineligibility and the 40 month recoupment, Ms. Hardy had completely expended the personal injury award. In November, 1985, Ms. Hardy's mother, who is disabled, received an eviction notice from her landlord. Ms. Hardy spent substantial portions of her personal injury award on moving expenses for her mother and her family. Ms. Hardy later moved into her mother's apartment with her children to reduce family expenses. Approximately $300 of the money was spent on the purchase of groceries during November and December, 1985 for the combined households. Part of the money was also spent on the repayment of an outstanding loan to her grandmother. Another portion of the funds was spent on the purchase of necessary items and basic living expenses such as winter clothing for herself and her children. By December, 1985, the entire insurance settlement had been exhausted, leaving no money to pay the winter's heating and utility bills or non-food items such as soap, detergent and toilet articles.

Plaintiff Little and her minor child were receiving AFDC benefits of $214 per month in 1985. She received her monthly AFDC checks in December, 1985 and January, 1986, and spent the checks for monthly ex-

penses. On December 4, 1985, she received a $749 lump sum settlement for bodily injury sustained in a slip and fall accident at a grocery store on August 15, 1984.

After reporting her personal injury award to Social Services, she was informed by written notice dated December 17, 1985, that she was ineligible to receive the December, 1985 and January, 1986 AFDC checks. She appealed this decision and the original decision of ineligibility was upheld whereby the AFDC benefits for those two months were ordered recouped. Ms. Little is dependent on the continued receipt of her AFDC payments in order to meet her needs and those of her minor child.

In each of the above situations, the imposition of the lump sum rule resulted in harsh inequities to the families involved. An adverse decision in this case would leave these families and many other families who receive personal injury awards without the means to obtain food, clothing and shelter. A principle interest of *Amicus* is the protection and preservation of the court decision below to ensure that needy children and their families can receive financial assistance.

The Secretary of the United States Department of Health and Human Services has issued a new regulation which purports to treat all lump sum payments, including "windfalls" (which would include personal injury awards), as "income" to be counted under the lump sum rule. 52 Fed. Reg. 9191, 96 (March 18, 1986) (to be codified at 45 C.F.R. § 233.20(a)(3)(ii)(F)). The Secretary has filed a Brief as Respondent Supporting Petitioner in which he argues that the March 18, 1986 final regulation is dispositive of the entire issue and requires reversal of the decision below. The State of North Carolina has joined in an *amicus* brief with seven other states in support of petitioner's position. Therefore, LSNC's interest in this case is considerable and justified.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus, Legal Services of North Carolina on behalf of its clients, urges affirmance of the judgment of the United States Court of Appeals for the Fourth Circuit. Petitioner argues that the opinion of the United States Court of Appeals for the Seventh Circuit in *Watkins v. Blinzinger*, 789 F.2d 474 (7th Cir. 1986), *aff'g* 610 F. Supp. 1443 (S.D.Ind. 1985), best construes the AFDC statute and furthers legislative intent. Respondents and *Amicus*, however, strongly urge the Court to hold that the purpose of the AFDC statute and Congressional intent support the exclusion of personal injury awards from the definition of "income."

Amicus argues (Point I) that, given the legislative history and clearly established rules of statutory construction, Congressional intent dictates the exclusion of personal injury awards from the term "income" under the lump sum rule. Since Congress did not indicate that it intended to use a definition of "income" that is broader than the traditional legal definition, it is clear that Congress did not intend to include personal injury awards as "income" under the AFDC statute. *Amicus* further argues (Point II) that the Court should not give deference to the Secretary's interpretation of the lump sum rule, because it is inconsistent with Congressional intent and his own prior pronouncements, and defeats the very purpose of the AFDC Act. Therefore, the judgment below should be affirmed.

ARGUMENT

I. CONGRESS INTENDED THE EXCLUSION OF PERSONAL INJURY AWARDS FROM THE DEFINITION OF INCOME IN THE AFDC STATUTE.

The Court of Appeals for the Fourth Circuit correctly determined that personal injury awards must be excluded from the definition of "income" in the AFDC statute. The Fourth Circuit carefully analyzed the "lump sum" rule of the Omnibus Budget Reconciliation Act of 1981 (OBRA) in making its determination. Congress passed the lump sum rule to encourage AFDC recipients to budget large payments of income to meet ongoing needs of their households.

Before 1981, 42 U.S.C. § 602(a)(7) stated that ". . . the State agency shall in determining need take into consideration any other income and resources. . . ." When Congress implemented OBRA, it did not alter its language. Rather, Congress changed the *method* by which income would be counted. Under pre-1981 law, "[any] payments that [met] the definition of income . . . [were] counted as income in the month of receipt and any of the payment that [was] not spent in that month [was] usually considered as a resource in the months thereafter." In the 1981 Act, "income received in a month [would] be considered available as income in the month it is received and also in future months." S. Rep. No. 139, 97th Cong., 1st Sess. 505, *reprinted in* 1981 U.S. Code & Ad. News, 396, 702, 771. *See also* 42 U.S.C. § 602(a)(17) (before and after OBRA).

The court below correctly reasoned that the 1981 amendment changed the treatment of income, but did not change the definition of income. In fact, it found that OBRA did not even define "income." In the absence of a definition of income, the court concluded that Congress intended to include as income only those large payments of money that would ordinarily be considered in-

come. *Reed*, 774 F.2d at 1274-75. This Court set forth that principle when it stated that "deference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally require[s] us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 105 S.Ct. 1785, 1793 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

Based on the ordinary meaning of the term "income," personal injury awards should not be included as income under the lump sum rule. As this Court determined, "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, *unless the statute otherwise dictates*, that Congress means to incorporate the established meaning of these terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (emphasis added).

The term "income" has accumulated settled meaning. "Income" represents a "gain or profit," 42 C.J.S. Income § 531 (1944), and is ordinarily understood to be a return on the investment of labor or capital, thereby increasing the wealth of the recipient. *See Blacks Law Dictionary* 687 (5th ed. 1979). See also *Eisner v. Macomber*, 252 U.S. 189, 207 (1919).

On the other hand, "[p]ersonal injury awards serve to make one whole, in effect, restoring one to the status quo before the injury was suffered." *See Bowen v. Fidelity Banks*, 209 N.C. 140, 183 S.E. 266 (1936); *Carolina Power and Light Company v. Paul*, 261 N.C. 710, 136 S.E. 2d 103 (1964); 25 C.J.S. Damages § 17 (1966). "The damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money." *D. Dobbs, Remedies* § 3.1 (1973). *See also* 25

C.J.S. Damages § 17; *Black's Law Dictionary* 352 (5th ed. 1979). Hence, personal injury awards do not represent a return on investment of labor or capital. *See also* The Internal Revenue Code, 26 U.S.C. § 104 which states that gross income does *not* include "the amount of any damages received . . . on account of personal injuries or sickness." Rather, as the Fourth Circuit found, personal injury awards replace losses due to pain and suffering. *See Reed*, 774 F.2d at 1275.

Congress was well aware of the common meaning of "income" when it redrafted 42 U.S.C. § 602(a)(7) and (17). If Congress had intended to radically change the definition of "income" to include damages in such a way as to be repugnant to 200 years of American law, it would have clearly so stated.

In total contradiction to these established principles, the Secretary argues that the term "income" refers to the gross receipts an AFDC family has available to meet its monthly needs. The Secretary relies upon *Heckler v. Turner*, 105 S.Ct. 1138 (1985) to support his theory that the gross receipts available to an AFDC family for support are income. Significantly, *Heckler v. Turner* did not address personal injury awards. Rather, the opinion centers on mandatory tax withholdings from wages or salary. Unlike personal injury awards, mandatory tax withholdings represent wages and fall within the ordinary meaning of "income." The Secretary's reading of *Heckler v. Turner* is overly broad. The case cannot be cited for the proposition that personal injury awards come within the purview of term "income." With his misplaced reliance on *Heckler v. Turner*, the Secretary, in effect, seeks to overturn a whole body of tort law. When he implemented his expansive definition of "income," the Secretary substantially rewrote the statute in disregard of Congressional intent. These actions are clearly arbitrary, capricious and repugnant to a whole body of American jurisprudence.

Not only does the Secretary's contrived definition of income contradict Congressional intent, but it also frustrates the very policy that Congress sought to implement. The situation the Secretary envisions is far removed from the financial realities confronting many AFDC families. The Secretary blinks at reality and blatantly ignores the fact that often personal injury victims sustain injuries that result in physical and mental impairments extending beyond the receipt of the personal injury award. Although the Secretary discounts prior medical expenses in determining a disqualification period, he fails to recognize the frequent existence of future expenses relating to the injury. Contrary to the Secretary's assumption, the personal injury award may not be available to meet the ongoing needs of the AFDC family. When additional expenses arise, the disqualified AFDC household is often forced to use its personal injury award to seek proper medical care, leaving no money for food, shelter and other survival needs of the family.

The Secretary correctly points out that Congress intended for AFDC benefits to be provided only to needy families. *See Shea v. Vialpando*, 416 U.S. 251 (1974). He then argues that the most sensible reconcilation of the concepts of "income" and "resources" is ". . . one that best encourages a family to budget its income and resources to take care of itself. . . . [T]he Secretary's treatment of personal injury . . . awards gives the statutory language its congressionally intended effect." *See* Brief for the Secretary of Health and Human Services as Respondent Supporting Petitioner at 13. However, his new regulation utterly fails to achieve this Congressional purpose. Not only does the Secretary refuse to recognize the ordinary meaning of "income," but he denies AFDC recipients the opportunity to budget their personal injury awards for future expenses.

For example, in the class action pending in North Carolina, one plaintiff alleged she was forced during her

period of disqualification to pawn part of her furniture, and to sleep on the floor with her minor child, in order to purchase food for her child and to obtain medical care for herself. *See* p. 3, *supra*. Hence, circumstances beyond her control dictated that she could not budget her personal injury award as "income" in the manner the Secretary contemplates. In this case and many similar cases, in addition to thwarting the Congressional purpose of encouraging budgeting by the AFDC recipient, the application of state and federal regulations purporting to interpret the lump sum rule utterly defeats the purpose of the AFDC statute which is to assist needy families.

Both the Secretary's regulation and his interpretation of the statute ignore the ordinary meaning of the term "income," thereby imposing harsh inequities upon needy parents and their children. Congress intended that personal injury awards be excluded from the definition of income in the AFDC statute. In order to fulfill the Congressional intent to encourage budgeting and to assist the needy, Health and Human Services' new regulation must be declared invalid. Only by affirming the decision in *Reed* will these families be afforded the means to meet their basic needs of survival as Congress intended.

II. THE SECRETARY'S INTERPRETATION OF THE OBRA LUMP SUM AMENDMENT IS NOT ENTITLED TO DEFERENCE.

The Secretary of Health and Human Services, by enacting 45 C.F.R. § 223.20(a)(3)(ii)(F), has impermissibly rewritten the OBRA lump sum statute. He now asks the Court to legitimate his nonconformance with Congressional intent by holding that his interpretation of the OBRA lump sum rule is "reasonable" and, as such, is entitled to deference. The Secretary's interpretation of OBRA as expressed in his new regulation and in his brief is not entitled to deference since his interpretation is inconsistent with Congressional intent and his own prior

pronouncements, and defeats the very purpose of the AFDC Act.

Although it is true that the Secretary's interpretation of the Social Security Act would be entitled to deference, this deference does not abrogate the Court's duty to interpret the Act in a manner consistent with Congressional intent. Federal courts, not administrative agencies are the final arbiters of statutory construction. This Court has held that " 'deference owed to [agency interpretation of statutes they are empowered to administer] cannot be allowed to slip into judicial inertia which result in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' " *Bureau of Alcohol, Tobacco and Fire Arms v. Federal Labor Relations Authority*, 104 S.Ct. 439, 444 (1983) (quoting *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, 318 (1965)). This Court further mandates that courts must not rubber-stamp administrative decisions; rather, they must insure that these decisions are consistent with the statutory mandate and do not frustrate Congressional policy underlying the statute. 104 S.Ct. at 444.

Ordinarily, administrative interpretations of statutory terms are given important—but *not controlling*—significance. *Batterton v. Francis*, 432 U.S. 416 (1977). However, deference that the Secretary seeks is constrained by this Court's "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979) (quoting *Teamsters v. Daniel*, 439 U.S. 551, 566 (1979)).

The obvious inconsistency of the new lump sum regulation with Congressional intent can readily be seen from the legislative history of OBRA. When it revised 42 U.S.C. § 602(a)(17), Congress did not expand, constrict or otherwise alter the definition of "income." *See* p. 7, *supra*. The language of the lump sum rule and the history surrounding it in no way suggest that Congress

intended to change anything other than the *treatment* of lump sum "income."

The weight afforded to agency interpretative regulations "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, *its consistency with earlier and later pronouncements*, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (emphasis added). *See also St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 783, n. 13 (1981); K. Davis, *Administrative Law*, § 5.03 (3rd Ed. 1972). In this case, there has been a gross lack of consistency by the Secretary interpretating the OBRA lump sum rule. Previously, but long after enactment of OBRA, the Secretary had propounded the policy of treating as "resource," not "income," damage to a "resource" such as a car. (J.A. 46-47) Now, with the enactment of the *final* regulation 45 C.F.R. § 223.20(a)(3)(ii)(F), the Secretary requires states to treat resource damage awards as "income" and to be counted under the lump sum rule. Brief for the Secretary of Health and Human Services as Respondent Supporting Petitioner at 19.

Furthermore, the Secretary previously permitted the states to treat personal injury awards as either "income" or "resource." (J.A. 62) Then, while cases on this issue were pending throughout the country, the Secretary issued proposed new regulations which would require all states to treat all "windfalls" as "income" under the lump sum rule. 49 Fed. Reg. 45558 (November 14, 1984). No mention of personal injury awards was made in his definition of "windfall." However, when the final regulation was issued—after a Third Circuit decision unfavorable to the Secretary's position and while this case was pending before this Court on petition for a writ of *certiorari*—the Secretary specifically included personal injury awards in the definition of "income." 50 Fed. Reg. 9205 (March 18, 1986) (to be codified at 45 C.F.R. § 233.20(a)(3)(ii)(F).

Not only has the Secretary vacillated in his rulings, but he has conveniently contrived new versions of the lump sum rule to meet the objections raised in the various court cases. This type of blatant manipulation of agency regulation by the Secretary is not entitled to deference.

Under the Secretary's interpretation of OBRA, Congressional intent is badly frustrated. The AFDC program was created to encourage "the care of dependent children in their own homes . . . by enabling each State to furnish financial assistance . . . to needy depending children . . . to help maintain and strengthen family, life and . . . maximum self support. . . ." 42 U.S.C. § 601. Yet, by improper operation of the lump sum rules, this purpose is thwarted, leaving AFDC families destitute. *See*, p. 11, *supra*.

Therefore, the Secretary's regulation contradicts the provisions of the statute and frustrates congressional intent. Further, the regulation exceeds the Secretary's statutory authority and is arbitrary and capricious. Therefore, the regulation is not entitled to any deference whatsoever. *Securities Industry Association v. Board of Governors*, 104 S.Ct. 2979 (1984); 5 U.S.C. § 706; *see also Yuckert v. Heckler* 774 F.2d 1365 (9th Cir. 1986). Where, as in this case, the regulation is invalid, it is the intention of Congress as interpreted by the Court that must prevail. *Id.*

The Secretary attempts to set a dangerous precedent. He seeks to insure that the Court will adopt his position by issuing a regulation at the eleventh hour of this litigation by arguing that this regulation is "[a] reasonable interpretation of [the AFDC] statute. . . ." Brief for the Secretary of Health and Human Services as Respondent Supporting Petitioner at 10. This backdoor approach to law making is repugnant to the judiciary's role in statutory interpretation. As this Court accurately noted in *Securities Industry Association v. Board of Governors*:

> [D]eference is not a device that emasculates the significance of judicial review. Judicial deference to an agency interpretation of a statute "only sets the significance of judicial analysis; it does not dispell it." A reviewing court "must reject administrative construction of [a] statute, rather reached by adjudication or by rulemaking that [is] inconsistent with the statutory mandate or that frustrates the policy that congress sought to implement."

104 S.Ct. at 2983 (1984) (citations omitted).

The Secretary's self-serving interpretation of OBRA is unreasonable and clearly disregards congressional intent as well as judicial power. Therefore, the Court should not accord any deference to the Secretary's interpretation of the OBRA lump sum amendment as expressed in 45 C.F.R. § 233.20(a)(3)(ii)(F).

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM L. LUKHARD, Commissioner of the Virginia Department of Social Services,

Petitioner,

V.

ONA MAE REED, SALLIE LONG, RUTH WILCHER, OPAL MAE COOK, STELLA KING, AND ALL OTHERS SIMILARLY SITUATED,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF AMICUS CURIAE JEANNETTE ROCHFORD

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae Jeannette Rochford and two other named plaintiffs filed suit in United States District Court for the District of Rhode Island in 1982, seeking injunctive relief from an expansive application of the "lump sum income" rule by the agency which administered Rhode Island's Aid to Families with Dependent Children ("AFDC") program. Rochford et al v. Affleck, C.A. No. 82-0470 (D.R.I. August 10, 1982)(Consent Order).

The case was promptly settled on terms fully favorable to the plaintiffs, and relief under the consent decree was extended to a class of AFDC recipients which plaintiffs had sought to represent.[1]

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1. The Court treated the case as a class action, but ruled that formal class certification was unnecessary.

The issue in Rochford was whether the cash proceeds realized from the sale of a resource (such as a car, a home, etc.) are "lump sum income" for the purposes of the AFDC program, or are simply a resource which has been converted from a non-liquid form to cash. The State quickly conceded that proceeds from the sale of a resource are a cash "resource", not "income": Rhode Island's regulations were amended, and have, since August 1982,[2] treated proceeds from the sale of resources as cash resources, not lump sum "income". Rhode Island has sought and obtained full "Federal financial participation" in its AFDC program during this period.

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2. The regulation challenged in Rochford was relatively new at the time, having been promulgated subsequent to the passage and federal implementation of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 845 ("OBRA").

Amicus Curiae submits this memorandum because under new federal regulations, and in particular under interpretations of those regulations revealed for the first time in its Brief in this Court in this case, the Department of Health and Human Services would now apparently impose on states and on AFDC recipients the same unlawful treatment of proceeds from the sale of resources that was successfully attacked in Rochford. Amicus contends, with and in support of respondents in the case before this Court, that characterization of such proceeds as "income" violates the plain meaning of the Social Security Act, and that the federal regulations in question were promulgated in violation of the federal Administrative Procedures Act.

Amicus Rochford adopts the arguments presented by respondents: The argument

presented below is limited to issues raised by the application of the federal policy and interpretation at issue in this case to facts which arose in Amicus Rochford's case and which will arise in the circumstances of large numbers of similarly situated AFDC recipients across the nation.

SUMMARY OF ARGUMENT

The "lump sum income" rule, created by Congress in 1981, carried with it no redefinition of the term "income" as used in the AFDC program. Nothing in the then-existing meaning of AFDC "income" or in any subsequent Congressional enactment would allow for inclusion of what have always been treated as "resources" as payments subject to the "lump sum income" rule. Nevertheless, the Department of Health and Human Services (HHS) has engaged in a creeping expansion of its own (as opposed to Congress') view of "income": HHS at first suggested that personal injury awards have been transformed from "resource" to "income", and most recently has suggested that "casualty loss" payments have suffered the same fate. It appears from its submissions to this Court that HHS would now characterize the pro-

ceeds from the sale of an AFDC-exempt resource as "income" subject to the "lump sum" rule.

HHS does not have the authority to arbitrarily redefine the basic parameters of the AFDC program. It is not overly simplistic, in response to HHS' linguistic revisionism, to argue that "income is income" and "resources are resources": Definitions of terms as critical as these change only with Congressional Acts, not with the mere passage of time or swing of administrative mood. In the absence of any Congressional indication that "income" means more than the term has meant in the past, HHS' steady expansion of the reach of the lump sum rule violates the Social Security Act and the Administrative Procedures Act, and is thus both substantively and procedurally unlawful. The decision of the Fourth Circuit Court of Appeals should be affirmed.

ARGUMENT

Prior to June, 1982, Amicus Rochford and her children were recipients of AFDC benefits in Rhode Island, and lived in a home owned by Ms. Rochford. The home was an "exempt" resource for AFDC purposes, under Rhode Island rules consistent with 42 U.S.C. §602(a)(7)(B).

On June 3, 1982, Amicus Rochford sold her home for $18,000, and one week later used the entire proceeds of the sale (and $300 more) to purchase a ten year old mobile home (with land) into which she and her family moved. The new home, like its predecessor, was an "exempt" resource for AFDC purposes. The question raised by this simple scenario was this: Did Amicus Rochford experience "lump sum income" which should render her ineligible for AFDC benefits for four and one half

years?[3] Or, as amicus successfully contended in her Rhode Island lawsuit, was the transaction merely a conversion of a resource from one form (real estate) into another (cash) and back to the original (real estate)?

These questions were relatively easily answered. HHS provided the direct answer in its own explanatory material published with final regulatory implementation of the "lump sum income" rule:

> Comment: One commenter questioned whether money received from the sale of allowable resources is exempt.
>
> Answer: As the term resources includes non-liquid assets, the

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3. Application of the lump sum income rule to Amicus Rochford's situation led to an attempt by Rhode Island to terminate her from the AFDC program and render her ineligible "until November, 1986."

> change from a non-liquid asset, e.g. a bicycle valued at $50 to cash of $50 through the sale of that asset, does not change the total value of the assets held and such resource would be exempt if the allowable statutory amount were not exceeded.

47 Fed. Reg. 5657 (February 5, 1982)(emphasis added)

Thus, it was clear in 1982 (to the Rochford litigants, and to other states' welfare administrators, who reached the same conclusion) that conversion of a resource into cash created a cash resource, not "income".

Respondents argue forcefully in their Brief that HHS has historically defined resources to include transformation of resources into other resources. Cash proceeds from the sale of resources are clearly in the mainstream of this definition. Amicus does not repeat Respondent's argument here, but adopts it fully.

Remarkably, in the absence of any Congressional change in the AFDC definitions of "income" and "resource", HHS appears to have completely reversed its position, and would now characterize proceeds from the sale of property as lump sum "in- come", and not as a "resource". Although HHS (understandably) avoids explicitly so stating, its recent regulatory pronounce- ments and its Brief to this Court in the present case reveal the extent to which its steadily expanding definition of "in- come" has swallowed what was formerly a "resource".

Respondents document in detail in their Brief that "personal injury awards" were never included as "lump sum income" under federal regulations until HHS' March 18, 1986 announcement of "final" lump sum rule regulations. 51 Fed. Reg. 9196-9197.

Now, in its Brief to this Court, HHS goes much further:

> The Secretary's new regulation requires the states to treat casualty loss and personal injury loss awards similarly: Both are now treated as "income" subject to [lump sum rule] proration..."

(Brief for the Secretary of HHS, at pp. 9-10) (emphasis added).

At pp. 18-19 of his Brief, the Secretary states even more forcefully:

> "The Secretary's rules now clearly require the states to treat awards for casualty losses and personal injury...losses similarly: Both are 'income'"...

Id. pp. 18-19.

These arguments are fabrications: The "Secretary's rules" nowhere even mention "casualty losses", and certainly nowhere "clearly require" any particular treatment (i.e. "income" v. "resource"). The phrase "casualty loss" appeared for the first time in the Secretary's Brief to this Court.

Beyond their simple incorrectness,[4] the Secretary's references to "casualty loss" payments as lump sum income reveal the federal intent to characterize any lump sum of money as lump sum "income". The "casualty loss" characterization is of particular concern to Amicus Rochford (and others who might sell an AFDC-exempt resource) because it strongly suggests that the Secretary now also characterizes proceeds from the sale of a resource as lump sum "income". Indeed, it is hard to imag-

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4. HHS' argument before this Court that casualty loss payments are "lump sum income" is contradicted by the explanatory material accompanying the Secretary's own March 18, 1986 regulatory amendments: "States must disregard from the lump sum payment any amount that is earmarked and used for the purpose for which it is paid, i.e. monies paid for ... replacement or repair of resources, etc." 51 Fed. Reg. 9197.

ine the Secretary characterizing an insurance agent's payment for the loss of a home to fire as "income" while characterizing a buyer's payment of the same amount of money for the same home as a "resource".

Thus, the Secretary's own pronouncements in the course of the present litigation reveal the extent to which the HHS characterization of "income" has grown. Without the benefit of even a single word of Congressional directive, a transaction which (the Secretary stated in 1982) simply changed an exempt resource into a cash resource now creates "income".

The federal expansion of the definition of "income" leaves even Petitioner Lukhard behind. At p. 19 of his Brief, Petitioner states:

> "Virginia does not require recipients who own an allowable resource, and who either sell that resource or lose it to fire or

> other casualty, to spend the monies from the sale or any insurance proceeds to meet current living expenses. Such monies are treated as a resource, not subject to the lump sum rule."

Brief on behalf of Petitioner, p. 19.

Petitioners' position on this point is consistent with the long-standing federal definitions of "income" and "resource", and is even consistent with the March 18, 1986 federal regulatory amendment, the Secretary's suggestion to the contrary notwithstanding.

Thus, the ever-widening swath cut by HHS' definition of "income" does not stand up to analysis. Neither HHS' historical definition of "income" and "resource" nor current interpretations by the Petitioner or other states support the HHS position. The reach of the "lump sum income" rule to "casualty loss payments" and, by extrapolation, to cash proceeds from the sale of

resources illustrate the degree to which HHS has departed from the definition of "income" Congress necessarily meant to incorporate in creating the lump sum income rule.

CONCLUSION

For the reasons set out here and in Respondent's Brief, the decision of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Jeannette Rochford,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 1986, I served three copies of the above Brief on Behalf of Amicus Curiae Jeannette Rockford, by first-class mail, to the following:

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